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91-1785

No.

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES PLUMMER, SHERIFF
OF ALAMEDA COUNTY,

Petitioner,

v.

JAMES PETTAWAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the collateral estoppel component of the Double Jeopardy Clause, hitherto limited to successive criminal prosecutions brought by the State, should be expanded to retrials sought by the defendant?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT 2

- A. Factual Background 2
- B. Procedural History 5

REASONS FOR GRANTING THE PETITION 7

- A. The Ninth Circuit's Rationale Is Directly Contrary To This Court's Precedents 8
- B. Conflict Between State and Federal Law, and Between the Federal Circuit Courts, Requires this Court's Resolution 14

CONCLUSION 18

Sub-pages

APPENDIX A 1-19
APPENDIX B 20-28
APPENDIX C 29-94
APPENDIX D 95-106
APPENDIX E 107

TABLE OF AUTHORITIES

Page

Cases

Ashe v. *Swenson*
397 U.S. 436 (1970) 7

Detrich v. *United States*
924 F.2d 479 (2nd Cir. 1991) 12

Dowling v. *United States*
493 U.S. 342 (1990) 10

Ferenc v. *Dugger*
867 F.2d 1301 (11th Cir. 1989) 16

Flittie v. *Solem*
775 F.2d 933 (8th Cir. 1985)(en banc),
cert. denied, 475 U.S. 1025 (1986) 16

Grady v. *Corbin*
495 U.S. 508 (1990) 7, 11

Hall v. *Superior Court*
45 Cal.2d 377 (1955) 15

Justices of Boston Municipal Court v. *Lydon*
466 U.S. 294 (1984) 10

Lockhart v. *Nelson*
488 U.S. 33 (1988) 8

McIntyre v. *Trickey*
938 F.2d 899 (8th Cir. 1991) 12

Montana v. *Hall*
481 U.S. 400 (1987) 8

TABLE OF AUTHORITIES, cont'd

North Carolina v. *Pearce*
395 U.S. 711 (1969) 9

Ohio v. *Johnson*
467 U.S. 493 (1984) 10

People v. *Murphy*
59 Cal.2d 818 (1963) 15

People v. *Pettaway*
206 Cal.App.3d 1312,
254 Cal.Rptr. 436 (1988) 14

Price v. *Georgia*
398 U.S. 323 (1970) 10

Richardson v. *United States*
468 U.S. 317 (1984) 10

Sealfon v. *United States*
332 U.S. 575 (1948) 7, 10

Tibbs v. *Florida*
457 U.S. 31 (1982) 9

United States v. *Ball*
163 U.S. 662 (1896) 8

United States v. *Citron*
853 F.2d 1055 (2nd Cir. 1988) 16

United States v. *Crooks*
804 F.2d 1441 (9th Cir. 1986) 16

United States v. *DeVincent*
632 F.2d 155 (1st Cir. 1980),
cert. denied, 450 U.S. 984 (1981) 16

TABLE OF AUTHORITIES, cont'd

United States v. *Dray*
901 F.2d 1132 (1st Cir.),
cert. denied, 111 S.Ct. 245 (1990) 16

United States v. *Farmer*
923 F.2d 1557 (11th Cir. 1991) 12

United States v. *Felix*
___ U.S. ___,
60 U.S.L.W. 4259 (Mar. 25, 1992) 12

United States v. *Head*
697 F.2d 1200 (4th Cir. 1982),
cert. denied, 462 U.S. 1132 (1983) 16

United States v. *Kaytso*
868 F.2d 1020 (9th Cir. 1988) 16

United States v. *Martinez*
785 F.2d 663 (9th Cir. 1986) 16

United States v. *Mock*
604 F.2d 336 (5th Cir. 1979) 17

United States v. *Oppenheimer*
242 U.S. 85 (1916) 10

United States v. *Powell*
469 U.S. 57 (1984) 12

United States v. *Powell*
632 F.2d 754 (9th Cir. 1980) 16

United States v. *Price*
750 F.2d 363 (5th Cir. 1985) 15

TABLE OF AUTHORITIES, cont'd

United States v. *Richard*
892 F.2d 761 (9th Cir. 1989) 16

United States v. *Ricks*
882 F.2d 885 (4th Cir. 1989),
cert. denied, 110 S.Ct. 846 (1990) 16

United States v. *Scott*
437 U.S. 82 (1978) 9

United States v. *Tateo*
377 U.S. 463 (1964) 9

Yates v. *United States*
354 U.S. 298 (1957) 10

Constitutional Provisions

United States Constitution
  Fifth Amendment 2

Statutes

California Penal Code
  § 187 4
  § 664 4
  § 12022.5 5
  § 12022.7 5

No.

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October Term, 1991

CHARLES PLUMMER, SHERIFF
OF ALAMEDA COUNTY,

Petitioner,

v.

JAMES PETTAWAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed August 23, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 943 F.2d 1041 (1991) (App. A, *infra*, 1-19). The District Court's order denying the petition for writ of habeas corpus was unreported (App. B, *infra*, 20-28). The December 29, 1988, opinion of the California Court of Appeal is reported at 206 Cal.App.3d 1312, 254 Cal.Rptr. 436 (1988) (App. C, *infra*, 29-94). The May 16, 1985, opinion of the California Court of Appeal was unreported (App. D, *infra*, 95-106).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 23, 1991. Rehearing and rehearing en banc were denied on March 24, 1992 (App. E, *infra*, 107). This petition for writ of certiorari follows within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rules 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT

A. Factual Background

On March 1, 1981, respondent visited Karen Taylor at her home in Oakland, California. Taylor left to pick up Michael Seals at the bus stop, leaving respondent behind. While Taylor was gone, respondent's girlfriend, Lawana

Walker, came by. On her return, Taylor joined respondent and Walker at the dining room table, while Seals stood near a heater between the dining and living rooms. Respondent offered the women cocaine. Taylor declined; Seals watched as respondent and Walker snorted cocaine.

Seals heard respondent say to Walker, "Give me the thing." Walker took a handgun from her purse and handed it to respondent, who then walked past Seals into the living room. Respondent turned toward Seals, who had his back to him, and shot Seals in the back of the neck. As Seals fell to the floor, he saw Taylor run into the kitchen. Seals then fainted.

Seals regained consciousness in time to see respondent and Walker leave the house together. The police later discovered Taylor's body in the bathtub. She had been shot twice while kneeling in the bathtub facing her assailant.

Respondent fled the state. He was arrested some months later in Texas, after he ran a red light. He gave a false name when arrested, but subsequently gave his true name. A search of his motel room revealed seven bullets matching those found in Taylor's body.

Respondent's former employer testified that he kept a gun and bullets in his office, that the gun was missing on the morning of March 1, 1981, that the gun was later returned, but that some ammunition was missing. Ballistic evidence showed that the gun was used to shoot Taylor. The bullet in Seals' neck was never removed.

Respondent admitted that he and Walker were at Taylor's house. He stated that they had been up all night drinking and snorting cocaine with Taylor and another man. In the morning, while respondent and Walker were briefly absent, a second man arrived. After respondent and Walker returned to Taylor's home, Taylor left to pick up Seals. Taylor asked respondent to keep an eye on the two men. When Taylor returned, the two men were in the back of the house, using cocaine.

Taylor asked to borrow respondent's gun for protection. Respondent took the gun from Walker and placed it on the dining room table, after which he sat on the sofa and closed his eyes. Respondent suddenly heard a gunshot, and saw Seals fall to the floor. When respondent heard a man ask, "Where is the other one at," he fled. He later saw Walker and the two men leave the house together.

Walker convinced respondent not to surrender. Walker initially told respondent that she shot Taylor; later Walker said that one of the other men shot Taylor because she had not paid him for some cocaine. Respondent fled the state. At trial, he declined to identify the two men in Taylor's house.

Neither party requested and the trial court initially did not give instructions on aiding and abetting. On the third day of deliberations, the jury requested instructions on the law of complicity, asking specifically whether respondent could be convicted of murder or attempted murder without having personally fired the gun. In response, the trial court instructed the jury on liability under an aiding and abetting theory.

The jury convicted respondent of first degree murder, Cal. Penal Code § 187, and attempted murder. Cal. Penal Code §§ 664/187. As to the attempted murder charge, the jury found true special enhancement allegations that respondent personally used a handgun and personally inflicted great bodily injury during the commission of the offense. Cal. Penal Code §§ 12022.5, 12022.7. The jury did not find true the identical special enhancements alleged as to the murder charge.

B. Procedural History

On May 16, 1985, the California Court of Appeal in an unpublished opinion affirmed the attempted murder conviction, but reversed the murder conviction due to instructional error. App. D. at 103, 106. On remand, respondent moved to preclude the prosecution from proceeding on retrial on the theory that he shot the victim, and from referring to him as the actual killer, contending that the not true findings on the special enhancement allegations collaterally estopped the prosecution from presenting evidence or argument on that issue.

The trial court granted respondent's motion, ruling that the prosecution could not present the case to the jury on a theory other than aiding and abetting. The trial court ruled irrelevant and inadmissible any evidence that petitioner was the actual killer or personally used a gun. Because the prosecution represented that the evidence supported only a finding that petitioner was the actual killer, the trial court dismissed the murder charge.

The People appealed, and on December 29, 1988, the California Court of Appeal in a published opinion reversed the dismissal. App. C at 63. The court held "that where a defendant has been convicted of first degree murder at his first trial and that conviction is reversed on appeal because of instructional error, the defendant may be retried as the murder perpetrator despite negative jury findings, at the first trial, on the personal use of a handgun and personal infliction of great bodily injury enhancement allegations." *Id.* at 34. The court rejected the application of collateral estoppel principles to the sentence enhancement findings, and suggested, in addition, that the jury's findings on the enhancement allegations were inconsistent with its finding of guilt on the murder charge. *Id.* at 46-47, 50. On April 20, 1989, the California Supreme Court denied review.

On January 2, 1990, the District Court for the Northern District of California denied respondent's petition for writ of habeas corpus. The district court found that the jury, when returning not true findings on the sentence enhancement allegations, did not determine necessarily that respondent was not the direct perpetrator of the murder because such determination was unnecessary to its finding that respondent was guilty of murder. App. B at 27. The court concluded that the sentence enhancement findings should not collaterally estop the prosecution from retrying respondent on the theory that he personally shot the victim. *Ibid.*

In a published opinion filed on August 23, 1991, the Ninth Circuit Court of Appeals reversed the district court's order and directed that court to issue the writ of habeas corpus. The court found that "the fact that the personal use determination at issue in the present case was not formally necessary for a finding of guilt on the murder charge does not prevent the finding from having collateral estoppel effect in this case." App. A at 8. The court also found that the issue was "necessarily determined" for purposes of collateral estoppel, and that the sentence enhancement findings were not inconsistent with the jury's finding that respondent was guilty of murder. *Id.* at 12-13. The court reviewed this Court's recent decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990) and concluded that "[t]he present case presents essentially the same situation." App. A at 16. Applying the principles announced in *Grady*, the court held that the state trial court had correctly barred retrial on a theory that respondent was the actual perpetrator. *Id.* at 17. Because the prosecution stated that it could not retry respondent solely on an aiding and abetting theory, the court held that respondent's retrial could not proceed at all, and directed issuance of the writ. *Id.* at 19.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has ordered a murder charge against respondent dismissed on double jeopardy grounds even though the first trial resulted in a jury *conviction* of that murder. This Court has mandated that a double jeopardy inquiry "'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970), quoting *Sealfon* v. *United States*, 332 U.S. 575, 579 (1948). By transforming a conviction into an acquittal, the Ninth Circuit has violated this mandate, and misapplied this Court's double jeopardy jurisprudence. The Ninth Circuit has created an exclusionary rule barring relevant evidence on retrial. That rule flies in the face of this Court's century-old ruling that a defendant, once convicted, is subject to retrial following successful appeal of his conviction. *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896).

The question presented in this case is simple: When a trial results in verdicts of both acquittal and guilt, what is the collateral estoppel effect, if any, of the acquitted counts upon retrial of the counts resulting in conviction? Applying this Court's double jeopardy precedents, the answer must be none. Upon retrial, the prosecution must be allowed to present all relevant evidence tending to show the defendant's culpability in the crime of which he has already been convicted, regardless whether some or all of that evidence underlies a count or charge of which the defendant was acquitted.

A. The Ninth Circuit's Rationale Is Directly Contrary To This Court's Precedents

This Court long has held "that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988). See *Montana* v. *Hall*, 481 U.S. 400, 402 (1987).[1] This well-established rule protects both the societal interest in punishing a defendant whose guilt is clear, and the defendant's interest in ensuring that the reviewing court zealously protects his right to a fair trial. *Lockhart* v. *Nelson*, 488 U.S. at 38-39; *United States* v. *Tateo*, 377 U.S. 463, 466 (1964).

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[1] Two exceptions apply to the general rule permitting retrial of a defendant: (1) when a jury convicts a defendant of a lesser offense, thereby impliedly acquitting him of the greater offense charged, *Green* v. *United States*, 355 U.S. 184, 190-191 (1957); and (2) when a reviewing court reverses the conviction for insufficient evidence. *Burks* v. *United States*, 437 U.S. 1, 18 (1978). Neither exception applies here.

Requiring "a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States* v. *Scott*, 437 U.S. 82, 91 (1978). See *Lockhart* v. *Nelson*, 488 U.S. at 42; *Tibbs* v. *Florida*, 457 U.S. 31, 40 (1982); *North Carolina* v. *Pearce*, 395 U.S. 711, 721 (1969). Where the state prosecutes all charges in one proceeding, and the defendant succeeds in getting his conviction reversed on appeal, a retrial simply places the parties in the same position that they would have been in had the trial court properly conducted the proceeding in the first instance. See *Lockhart* v. *Nelson*, 488 U.S. at 40-42.

In the present case, the prosecution sought to *retry* respondent for first degree murder, a crime of which he had previously been convicted. In its opinion barring the prosecution's efforts, the Ninth Circuit created an exclusionary rule, purportedly based on double jeopardy/collateral estoppel grounds, that precluded the prosecution, in this and all similar cases, from presenting relevant evidence on the charge to be retried. This exclusionary rule potentially affects *every* case in which a jury returns verdicts of acquittal and guilt, after which the defendant successfully challenges the convictions. The rule, however, has no basis in law or logic.

In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court first recognized the doctrine of collateral estoppel as a component of the Double Jeopardy Clause. *Dowling* v. *United States*, 493 U.S. 342, 347 (1990). The doctrine provides that "'when an issue of ultimate fact has once been determined by a valid and *final judgment*, that issue cannot again be litigated between the same parties in any *future* lawsuit.'" *Id.* at 347 (emphasis added). By its own terms, collateral estoppel has no application to a retrial after reversal. There has been no "final judgment," and the second trial is not a "future lawsuit," but a continuation of the same prosecution. Plainly, nothing is "collateral" about either trial.

This Court has never extended collateral estoppel protection beyond the successive prosecution circumstances of *Ashe*. In fact, the Court stated in *Ohio* v. *Johnson*, 467 U.S. 493, 500, n.9 (1984), that "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." By contrast, *Ashe* and earlier cases that applied collateral estoppel principles all involved successive trials, as opposed to retrials. See *Yates* v. *United States*, 354 U.S. 298, 335 (1957); *Sealfon* v. *United States*, 332 U.S. 575, 576-577 (1948); *United States* v. *Oppenheimer*, 242 U.S. 85, 86-87 (1916).

The distinction, which the Ninth Circuit's rationale erases, is fundamental. Like the well-established rule that double jeopardy principles do not bar retrial, *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 308-309 (1984), *Price* v. *Georgia*, 398 U.S. 323, 326, 329 (1970), see *Richardson* v. *United States*, 468 U.S. 317, 324-325 (1984), the collateral estoppel component of the Double Jeopardy Clause also does not bar retrial following a defendant's successful appeal. This conclusion follows from the identical purpose behind double jeopardy and collateral estoppel in this context -- to protect a defendant against seriatim prosecutions initiated by the state, causing a defendant the embarrassment, anxiety, and expense of having continually to defend against the same charges. See *Ohio* v. *Johnson*, 467 U.S. at 498-499; *Ashe* v. *Swenson*, 397 U.S. at 445-447. This purpose has no relevance to a retrial -- a proceeding that a defendant has affirmatively sought by means of an appeal. See *Lockhart* v. *Nelson*, 488 U.S. at 42; *Montana* v. *Hall*, 481 U.S. at 404; *United States* v. *Scott*, 437 U.S. at 91. In this respect, a retrial is critically different from a successive prosecution that results from the state's decision to initiate new litigation on a previously adjudicated offense. In the latter situation, the defendant is exposed to the very type of overreaching state conduct that the Double Jeopardy Clause was designed to prevent.

The Ninth Circuit relied on *Grady* v. *Corbin*, 495 U.S. 508 (1990), to justify its application of collateral estoppel on retrial.[2] In *Grady*, this Court held

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[2] Our argument that collateral estoppel principles have no application on retrial was fully presented for the first time in our petition for rehearing and suggestion for rehearing en banc of the Ninth Circuit's opinion. Neither party relied on *Grady* v. *Corbin*, either in briefing or at oral argument of this case. The Ninth Circuit's adoption of the *Grady* rule for purposes of applying collateral estoppel on retrial, however, brought the issue of collateral estoppel's application on retrial into sharp focus.

> "that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 510.

The Ninth Circuit's reliance on *Grady* was misplaced. *Grady*, like *Ashe*, applies only to *successive* prosecutions, not retrials. *Detrich* v. *United States*, 924 F.2d 479, 480 (2nd Cir. 1991); *United States* v. *Farmer*, 923 F.2d 1557, 1563 & n. 12 (11th Cir. 1991); see *United States* v. *Felix*, ___ U.S. ___, ___ [60 U.S.L.W. 4259, 4262] (Mar. 25, 1992); *McIntyre* v. *Trickey*, 938 F.2d 899, 902 (8th Cir. 1991).

Whatever the complexities in application of *Grady* to successive prosecutions, see, e.g., *United States* v. *Felix*, ___ U.S. at ___ [60 U.S.L.W. at 4262], its application on retrial following a defendant's conviction is intolerable. Yet under the Ninth Circuit's expansive view of *Grady*, when a count that resulted in acquittal shares common evidence with a count that resulted in conviction, retrial of the latter count may be barred. The Ninth Circuit has effectively created an exclusionary rule of relevant evidence that may prevent reprosecution of a conviction following reversal.

The Ninth Circuit's decision cannot be reconciled with the doctrine of inconsistent verdicts, which this Court reconfirmed in *United States* v. *Powell*, 469 U.S. 57 (1984). If a defendant cannot challenge a conviction with an inconsistent acquittal on appeal, it necessarily follows that he cannot use that acquittal to forestall the very retrial which he requested. That the verdicts may not be inconsistent, as the Ninth Circuit purported to find in this case, is of no consequence. The plain teaching of *Powell* is that it is unnecessary to harmonize verdicts, provided that findings of guilt are supported by substantial evidence. The Ninth Circuit's expansive application of collateral estoppel violates this fundamental principle.

In this case, the state intended to retry respondent on the charge of first degree murder. It did not intend to charge respondent a second time with sentence enhancement allegations of personal gun use and personal infliction of great bodily injury. The Ninth Circuit's ruling prevents the state from presenting all relevant evidence on the murder charge, and has effectively awarded respondent with an acquittal on the murder charge despite the jury's verdict of guilt, and despite the undisputed sufficiency of the evidence to support that verdict.

This situation is not isolated. Defendants convicted of murder, but "acquitted" of sentence enhancement allegations, may now argue that all evidence underlying the enhancement finding, such as for gun use, is inadmissible on retrial. Prosecutors must decide whether to forego charging sentence enhancement allegations to avoid potentially undermining a retrial on the substantive offense if the defendant successfully appeals his conviction. Furthermore, *any* case with verdicts of both acquittal and guilt is subject to the same infirmity. Defendants may argue on retrial that all evidence of conduct underlying the acquitted count must be excluded, thereby preventing the prosecution from presenting sufficient evidence to convict the defendant a second time on the counts that resulted in guilty verdicts.

The Ninth Circuit's application of collateral estoppel principles, and its adoption of the rule announced in *Grady* as the test to be applied, seriously erode the viability of the principle that the Double Jeopardy Clause does not prevent retrial. It serves society little to know that a defendant may be retried following reversal of a conviction, thus vindicating the "societal interest in punishing one whose guilt is clear," *United States* v. *Tateo*, 377 U.S. at 466, when the prosecution is prevented from introducing relevant evidence on the count to be retried. If the evidence remaining is insufficient to warrant conviction, the result will be a pretrial dismissal or post-trial acquittal, notwithstanding that the first verdict was based on evidence sufficient to convict beyond a reasonable doubt.

B. Conflict Between State and Federal Law, and Between the Federal Circuit Courts, Requires this Court's Resolution

In *People* v. *Pettaway*, 206 Cal.App.3d 1312, 254 Cal.Rptr. 436 (1988), the California Court of Appeal rejected the arguments later embraced by the Ninth Circuit. The state court found that collateral estoppel principles were not applicable in these circumstances. The court stated that the "negative finding on the enhancements was not essential to the judgment of conviction of first degree murder reached at the first trial, does not impose any finality on the merits and, therefore, does not collaterally estop the prosecution from retrying the appellant as the perpetrator nor preclude the presentation of admissible evidence to prove that theory of guilt." App. at 46-47. The state court explicitly relied on this Court's rule of continuing jeopardy in finding that the original jeopardy had never terminated. App. at 54. "Where neither double jeopardy nor the principle of collateral estoppel are applicable in preventing reprosecution, as is the case here, the parties are placed in the 'same position as if the cause had never been tried.' (*People* v. *Murphy* (1963) 59 Cal.2d 818, 833, citing to *Hall* v. *Superior Court* (1955) 45 Cal.2d 377, 381.)" App. at 55.

In its opinion, the Ninth Circuit disagreed with or ignored the state court rationale. The Ninth Circuit found collateral estoppel principles applicable, despite respondent's continuing jeopardy. The state and circuit courts are in conflict on the application of a fundamental constitutional principle. This conflict is intolerable to the administration of justice, for now criminal judgments in California may survive direct appeal only to founder in federal court.

The Ninth Circuit also is in conflict with federal circuit authority on the question whether collateral estoppel principles have application on retrial. See *United States* v. *Price*, 750 F.2d 363 (5th Cir. 1985). The Fifth Circuit explicitly held that collateral estoppel does not bar the introduction of evidence on retrial which directly supports the count to be retried, even though the same evidence was offered in the first trial in support of the counts of which the defendant was acquitted. *Id*. at 366.

In addition to the conflict between state law and other federal law on this issue, the Ninth Circuit's opinion highlights the confusion in the federal circuit courts over the application of collateral estoppel principles on retrial. Although this Court has never extended the principles announced in *Ashe* v. *Swenson* beyond the successive prosecution circumstances of that case, numerous federal circuit courts have done so. See, e.g., *United States* v. *Farmer*, 923 F.2d at 1563, n.12 (applying collateral estoppel on retrial, court did not reach question "whether the doctrine of collateral estoppel is limited, like its parent doctrine of double jeopardy, only to successive prosecutions"); *United States* v. *Dray*, 901 F.2d 1132 (1st Cir.), *cert. denied*, 111 S.Ct. 245 (1990) (collateral estoppel applied on retrial); *United States* v. *Citron*, 853 F.2d 1055 (2nd Cir. 1988) (retrial); *United States* v. *Crooks*, 804 F.2d 1441 (9th Cir. 1986) (retrial); *United States* v. *Head*, 697 F.2d 1200 (4th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983) (retrial); *United States* v. *DeVincent*, 632 F.2d 155 (1st Cir. 1980), *cert. denied*, 450 U.S. 984 (1981) (retrial); *United States* v. *Powell*, 632 F.2d 754 (9th Cir. 1980) (retrial). Compare *United States* v. *Richard*, 892 F.2d 761 (9th Cir. 1989) (collateral estoppel applied on successive prosecution); *United States* v. *Ricks*, 882 F.2d 885 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 846 (1990) (successive prosecution); *United States* v. *Kaytso*, 868 F.2d 1020 (9th Cir. 1988) (successive prosecution); *Ferenc* v. *Dugger*, 867 F.2d 1301 (11th Cir. 1989) (successive prosecution); *United States* v. *Martinez*, 785 F.2d 663 (9th Cir. 1986) (successive prosecution); *Flittie* v. *Solem*, 775 F.2d 933 (8th Cir. 1985)(en banc), *cert. denied*, 475 U.S. 1025 (1986) (successive prosecution); *United States* v. *Mock*, 604 F.2d 336 (5th Cir. 1979) (successive prosecution).

A review of the federal cases shows that the collateral estoppel analysis, whether applied to cases involving retrial or successive prosecutions, is the same, with *Ashe* v. *Swenson* cited as the primary authority. With the exception of *United States* v. *Farmer*, 923 F.2d at 1563, n.12, none suggested that "the doctrine of collateral estoppel is limited, like its parent doctrine of double jeopardy, only to successive prosecutions." With the Ninth Circuit's appropriation of the broad *Grady* rule for purposes of collateral estoppel analysis, the issue whether collateral estoppel has any application on retrial is put into sharp focus. Both the state courts and the federal courts are in need of this Court's guidance on this issue of nationwide importance, which affects every criminal case, state or federal, in which retrial follows verdicts of both acquittal and guilt.

The Ninth Circuit has, in effect, turned the Double Jeopardy Clause into an exclusionary rule barring relevant evidence on retrial. Certiorari should be granted to restore to state and federal governments the ability to retry a defendant using all relevant evidence tending to show culpability in the crime of which he has already been convicted, regardless whether some or all of that evidence underlies a count or charge of which the defendant was acquitted.

CONCLUSION

For the foregoing reasons, we respectfully ask that the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit be granted.

Dated: May 6, 1992

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APPENDIX A

James PETTAWAY,
Petitioner-Appellant,

v.

Charles PLUMMER,
Sheriff of Alameda County,
Respondent-Appellee

No. 90-15469.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 11, 1991.

Decided August 23, 1991.

Defendant was convicted of murder in state court. The conviction was reversed due to error in an instruction. On remand defendant moved to preclude prosecution on theory that defendant had personally killed victim. The trial court dismissed complaint after prosecution indicated it could proceed only on that theory. After the state Appellate Court reversed and the state Supreme Court denied review, defendant brought habeas corpus proceeding. The United States District Court for the Northern District of California, Samuel Conti, J., denied petition and appeal was taken. The Court of Appeals, Beezer, Circuit Judge, held that jury's rejection of sentence enhancement based on theory that defendant had personally fired shot that killed victim, had collateral estoppel effect precluding on double jeopardy grounds retrial of defendant for actually perpetrating murder.

Reversed and remanded.

1. Double Jeopardy

Constitutional guaranty against double jeoparty includes concept of collateral estoppel. U.S.C.A. Const.Amend. 14.

2. Judgment

Collateral estoppel analysis, in connection with double jeopardy claim, involves: (1) identification of issues in two actions for purpose of determining whether issues are sufficiently similar and sufficiently material in both actions to justify invoking doctrine; (2) examination of record of prior case to decide whether issue was "litigated" in first case; and (3) examination of record of prior proceeding to ascertain whether issue was necessarily decided in first case. U.S.C.A. Const.Amend. 14.

3. Judgment

Rejection by jury of proposed murder sentence enhancement for actually perpetrating crime, meant that jury had "necessarily determined" that defendant was not actual perpetrator for purposes of establishing whether collateral estoppel prevented on double jeopardy grounds retrial of defendant as perpetrator. U.S.C.A. Const.Amend. 14.

4. Judgment

"Constitutional collateral estoppel" exists where fact necessarily determined in defendant's favor by earlier acquittal makes conviction on challenged second trial impossible unless fact could be relitigated and determined adversely to defendant. U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial construction and definitions.

5. Judgment

When enhancement of penalties for substantive offense is presented to trial jury for its determination beyond reasonable doubt, and jury expressly determines enhancement issue adversely to prosecution, prosecution cannot seek to prove contrary at second trial of substantive offense, where it is not clear that there was simply inconsistent verdict in first trial. U.S.C.A. Const.Amend. 5.

6. Judgment

Rejection of sentencing enhancement factor in murder case, which necessarily involved finding that defendant had not personally perpetrated killing, had collateral estoppel effect barring on double jeopardy grounds retrial of defendant based on theory that he had perpetrated the killing. U.S.C.A. Const.Amend. 14.

Renee E. Torres, First District Appellate Project, San Francisco, Cal., for petitioner-appellant.

Joan K. Haller, Deputy Atty. Gen., San Francisco, Cal., for respondent-appellee.

Appeal from the United States District Court for the Northern District of California

Before BEEZER, NOONAN, and FERNANDEZ, Circuit Judges.

BEEZER, Circuit Judge:

James Pettaway seeks a writ of habeas corpus on the ground that the State of California's attempt to retry him for murder on the theory that he was the actual perpetrator of the murder violates the Double Jeopardy Clause. In a prior state court criminal proceeding, a jury determined that he did not actually perpetuate [sic] the murder. The district court denied the petition. We reverse.

I

At Pettaway's first state court trial, it was established that on May 1, 1981, Pettaway, Lowana Walker and Michael Seals were at the house of Karen Taylor. At some point, Walker handed Pettaway a handgun with which he shot Seals in the back of the neck. Seals fainted, but when he regained consciousness he saw Pettaway and Walker leaving the house through the front door. Taylor was subsequently found dead in the bathroom with two bullet holes in her head. *People* v. *Pettaway*, 206 Cal.App.3d 1312, 254 Cal.Rptr. 436 (1988).

Pettaway was charged with and convicted of one count of murder and one count of attempted murder. The information included sentencing enhancement charges that, with respect to both the murder and the attempted murder, Pettaway personally used a firearm and personally inflicted great bodily injury.

The prosecution tried the case on the theory that Pettaway personally shot Seals and Taylor. Although the jury initially was not given a jury instruction on aiding and abetting, it requested and received such an instruction during the third day of deliberations.

With respect to the charges of personal use of a firearm and personal infliction of great bodily injury, the jury was instructed that if it found Pettaway guilty on either substantive charge, it had the "duty" to determine whether Pettaway personally shot the relevant victim and that it could do so only if the proof established beyond a reasonable doubt that he had done so. The jury was further instructed that "all twelve jurors must agree to the decision, and to any finding you have been instructed to include in your verdict." At the same time that the jury found Pettaway guilty of both substantive counts, it also found, in a special verdict, that Pettaway did not personally use the handgun or inflict great bodily injury in the commission of the murder of Taylor. The jury was polled and was found unanimously to agree with the verdict.

On appeal, the California Court of Appeal reversed the murder conviction because it found reversible error in the aiding and abetting instruction.

On remand, Pettaway moved to preclude the state from proceeding on the theory that Pettaway personally shot Taylor. Pettaway argued that because the jury had found the sentence enhancements to be untrue with respect to the murder charge, the doctrines of double jeopardy and collateral estoppel barred the prosecution from advancing a theory that Pettaway shot Taylor. The trial court agreed, and because the prosecution said it could not proceed to trial solely on an aiding and abetting theory, the trial judge dismissed the murder count.

The California court of appeals reversed, *Pettaway*, 206 Cal.App.3d at 1315, 254 Cal.Rptr. 436, and the California Supreme Court denied review. Pettaway filed a petition for a writ of habeas corpus in federal district court, claiming that a retrial on the theory that he shot Taylor would violate the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. The district court denied the petition and Pettaway appeals.

II

We review *de novo* the denial of a petition for writ of habeas corpus. *Carter v. McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1986), *cert. denied*, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987).

[1] The constitutional guarantee against double jeopardy includes the concept of collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 445, 90 S.Ct. 1189, 1195, 25 L.Ed.2d 469 (1970). The basis for Pettaway's petition is that his reprosecution on the theory that he shot Taylor is barred by this element of the Double Jeopardy Clause. To resolve this claim, we must first determine whether the jury's finding that Pettaway did not personally shoot Taylor has collateral estoppel effect. If it does, we must

determine whether the Double Jeopardy Clause bars Pettaway's reprosecution.

[2] Collateral estoppel analysis involves a three-step process:

> (1) An identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; (2) an examination of the record of the prior case to decide whether the issue was "litigated" in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.

United States v. *Hernandez*, 572 F.2d 218, 220 (9th Cir. 1978).

[3] The state concedes that the question whether Pettaway fired the gun himself was actually litigated at the first trial. The prosecutor admitted that "at all times [his] theory of prosecution at [the original trial] and even now [at the retrial] would be that [Pettaway] shot and killed Karen Taylor." At argument, the state reiterated that it will not retry Pettaway if it is not permitted to claim that he fired the weapon.

The district court based its denial of Pettaway's petition on the third step of the collateral estoppel analysis, because the court believed the jury could have "'grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration.'"

Specifically, the court found that because California law makes the direct perpetrator of a crime and an aider and abettor equally guilty, *see People v. Beeman*, 35 Cal.3d 547, 554-55, 199 Cal.Rptr. 60, 674 P.2d 1318 (1984), "it is possible that the *verdict*, when considered as a whole, did not rely on the determination that [Pettaway] did not personally kill Ms. Taylor, but was grounded on a determination that [Pettaway] either personally shot Ms. Taylor or aided and abetted in her killing, without deciding between the two alternatives." (Emphasis in original.)

The district court's conclusion assumes that collateral estoppel does not apply unless the issue previously determined was necessary to the question of guilt or innocence. Discussion of the necessity prong of collateral estoppel analysis is usually framed in terms of determinations that were necessary to the "judgment" or the "verdict." *See, e.g., Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 n.2 (9th Cir. 1979) ("[R]elitigation of an issue . . . is not foreclosed if the decision of the issue was not necessary to the judgment reached in the prior litigation."); *Ashe*, 397 U.S. at 444, 90 S.Ct. at 1194 (court must determine whether jury could have grounded its "verdict" upon any other issue). However, the fact that the personal use determination at issue in the present case was not formally necessary for a finding of guilt on the murder charge does not prevent the finding from having collateral estoppel effect in this case.

The primary purpose of the rule that prior resolution of an issue will have collateral estoppel effect only if it was necessarily decided is to ensure that the finder of fact in the first case took sufficient care in determining the issue. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4421, at 193 (1981).[1] The Supreme Court has addressed this concern by focusing on the nature of the original proceedings. In *Burlington* [sic] v. *Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the Court held that where the death penalty phase of a criminal proceeding bears the "hallmarks of a trial on guilt or innocence," *id*. at 439, 101 S.Ct. at 1858, failure of the state to obtain a death sentence indicates that there was insufficient evidence to support that sentence and retrial is barred. We have extended this holding to enhancement factors relevant to non-capital sentences, stating that an essential consideration is "whether the sentencing proceeding at issue resembled a trial on punishment." *Durosko* v. *Lewis*, 882 F.2d 357, 359 (9th Cir. 1989), *cert. denied*, __ U.S. __, 110 S.Ct. 1930, 109 L.Ed.2d 294 (1990). *Durosko* followed the approach of the Fifth Circuit, which held that where the state was required to prove the enhancement factors beyond a reasonable doubt, failure to do so prevents the state, via the Double Jeopardy Clause, from attempting to prove the same enhancement at a second trial. *Id*. at 359

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1. The other major concern is that appellate review of a determination may not be available where the issue is not necessary to the determination of the final judgment. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4421, at 193 (1981). In California, the enhancement of a sentence pursuant to a finding of personal use of a firearm may be appealed. *See People* v. *Harty*, 173 Cal.App.3d 493, 219 Cal.Rptr. 85 (1st Dist. 1985).

(citing *Briggs* v. *Procunier*, 764 F.2d 368, 371 (5th Cir. 1985)).[2]

In the present case, although the jury did not have to reach the question of personal use of the handgun if it did not find Pettaway guilty of murder, it was *required* to do so once it found him guilty. California law requires that the enhancement for personal use of a firearm be "pleaded and proven as provided by law." Cal.Pen.Code § 1170.1 (Supp.); *see also People* v. *Hernandez*, 46 Cal.3d 194, 249 Cal.Rptr. 850, 856, 757 P.2d 1013, 1020 (1988) (the enhancements in the California Penal Code are "part of a determinate sentencing system the inevitable pattern of which is to require additional terms to be imposed only after the enhancement has been found true by the trier of fact"); *People* v. *Najera*, 8 Cal.3d 504, 509-10, 105 Cal.Rptr. 345, 350, 503 P.2d 1353, 1358 (1972) (Because of the severity of the additional punishment compelled by section 12022.5, the enhancement for personal use of a firearm, a "properly instructed jury" "must make a specific finding on the issue of use."). The jury was instructed that it had the duty to determine whether the state had proven beyond a reasonable doubt that Pettaway fired the

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2. Where the original proceedings have all the characteristics of a trial on guilt or innocence, it does not matter whether the fact at issue was originally determined in the guilt/innocence phase, the sentencing phase, or, as here, as an enhancement factor tried during the guilt/innocence phase. *See, e.g.*, *Delap* v. *Dugger*, 890 F.2d 285, 316 (11th Cir. 1989) (acquittal of felony murder in guilt/innocence phase prevents state from seeking death sentence on the ground that the killing occurred during the commission of a felony).

handgun.[3] Thus, the issue of use was tried to the jury in a proceeding with all the "hallmarks of a trial on guilt or innocence," and was "necessarily determined" for the purposes of collateral estoppel.

The state also argues that the jury did not necessarily determine that Pettaway did not fire the handgun because that finding could be inconsistent with the guilty verdict.

The Supreme Court has stated that

> where truly inconsistent verdicts have been reached, "[t]he most that can be said is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." . . . It is equally possible that the jury, convinced of guilt, properly reached its

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[3] California law requires that the enhancement be proved beyond a reasonable doubt, and that a unanimous jury determination is required. *See, e.g., People* v. *Allen*, 165 Cal.App.3d 616, 626, 211 Cal.Rptr. 837 (1985) (proof beyond a reasonable doubt); *People* v. *Frutos*, 158 Cal.App.3d 979, 988, 205 Cal.Rptr. 204 (1984) (unanimous verdict). We have no reason to doubt that the jury was so instructed in this case. Certainly, neither party makes any suggestion to the contrary.

That being so, there is no need to grant appellant's motion to augment the record with evidence that was not before the district court, and we decline to do so. *Cf. United States* v. *Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979); *see also Kirshner* v. *Uniden Corp.*, 842 F.2d 1074, 1077 (9th Cir. 1988). Those cases clearly apply to most appeals, and may or may not apply to habeas corpus appeals. *See Dickerson* v. *Alabama*, 667 F.2d 1364, 1366-68 (11th Cir.), *cert. denied*, 459 U.S. 878, 103 S.Ct. 173, 74 L.Ed.2d 142 (1982). However, we need not decide that issue in this case.

> conclusion on [one] offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

United States v. *Powell*, 469 U.S. 57, 64-65, 105 S.Ct. 471, 476, 83 L.Ed.2d 461 (1984) (quoting *Dunn* v. *United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356 (1932)). However, when there is only one *rational* conclusion to be drawn from the first jury's verdict, the Supreme Court has not allowed the possibility that the jury did not base the verdict on proper considerations to negate the collateral estoppel effects of the prior verdict. *See, e.g., Ashe*, 397 U.S. at 444 & n. 9, 90 S.Ct. at 1194-95 & n. 9 (the question is whether a *rational* jury could have based its decision on any other conclusion).

> Although in our concept of double jeopardy the law must recognize that a jury can act in an irrational manner--even to the point of ignoring the law or the Judge's instructions in a blend of undecipherable mercy--we must proceed on the basis that the jury in the first trial acted in a legally correct manner. Otherwise, the ultimate issue of fact decided by any jury could be second guessed and we could never apply the principle of collateral estoppel.

De La Rosa v. *Lynaugh*, 817 F.2d 259, 267-68 (5th Cir. 1987). The mere possibility that the jury acted irrationally, without more, will not negate the collateral estoppel effects of a prior verdict if a rational interpretation of the verdict as a whole is possible.

This is not a case in which there is a "truly inconsistent verdict." To the contrary, there is a rational explanation that takes into account the whole of the jury's verdict. The jury was instructed that even if Pettaway did not personally use the weapon, he could be guilty of first degree murder as long as he aided and abetted the murderer. Therefore, the specific finding that he did not personally use a firearm was not inconsistent with the conviction; rather, it was as if the jury had issued a special verdict to that effect regarding the substantive offense.

Pursuant to California law, Pettaway's use of the handgun was pleaded and tried to the jury. The jury necessarily decided that Pettaway did not fire the fatal shots. For these reasons, we hold that this determination has collateral estoppel effect. We must next determine whether that effect may bar the prosecution from proceeding on the theory that Pettaway fired the handgun.

III

[4, 5] The Fifth Amendment guarantee against double jeopardy embodies the concept of collateral estoppel. *Ashe*, 397 U.S. at 445, 90 S.Ct. at 1195. In applying collateral estoppel as a component of the Double Jeopardy Clause, some courts have distinguished between legal and constitutional collateral estoppel, holding only the latter to implicate a constitutional right. *See, e.g., United States* v. *Head*, 697 F.2d 1200, 1205 (4th Cir. 1982); *United States* v. *Mock*, 604 F.2d 336, 338-40 (5th Cir. 1979). Constitutional collateral estoppel exists where "a fact necessarily determined in the defendant's favor by his

earlier acquittal [makes] his conviction on the challenged second trial . . . impossible unless the fact could be relitigated and determined adversely to the defendant." *Head*, 697 F.2d at 1205. On the other hand, "double jeopardy guarantees are not engaged by collateral estoppel which, if applied, would merely restrict proof but not make conviction impossible." *Id.*

"[T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444, 90 S.Ct. at 1194. Consistent with this admonition, the Supreme Court has clarified that constitutional collateral estoppel depends on the actual circumstances of the second prosecution, rather than on some hypothetical application of the statute in question. For example, even if conduct for which a defendant was previously convicted is only one of several alternative kinds of conduct prohibited by the statute he is now charged with violating, the defendant has a substantial double jeopardy claim if the prosecution concedes that it will need to prove that conduct to convict the defendant. *Illinois* v. *Vitale*, 447 U.S. 410, 420, 100 S.Ct. 2260, 2267, 65 L.Ed.2d 228 (1980).

In *Grady* v. *Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), the defendant drove his automobile into another car, killing the driver and injuring the passenger. He pleaded guilty to driving while intoxicated and failing to keep right of the median. Two months later, the state brought homicide and criminal assault charges against the defendant for the death and injuries caused in the accident. The bill of particulars filed by the prosecution indicated that the prosecution intended to rely on three acts to prove the charges: (1) driving while intoxicated, (2) failing to keep right of the median, and (3) driving at a speed too fast for the weather and road conditions.

The Supreme Court held that the Double Jeopardy Clause barred the prosecution, stating that

> the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. . . . The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. On the other hand, a State cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct. . . . This holding would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which [the defendant] had already been convicted.

110 S.Ct. at 2093, 2094.

[6] The present case presents essentially the same situation. When Pettaway moved to prevent the State from proceeding on the theory that he shot Taylor himself, the prosecution admitted that it could not proceed on any other theory, because it could suggest no person Pettaway might have aided and abetted. The state trial court then prohibited the prosecution from proceeding on a theory based on conduct the state had previously failed to prove beyond a reasonable doubt.[4] The trial judge stated that he would not allow the prosecution to present to the jury the theory that "after he shot Michael Seals he then went and shot Karen Taylor."

The state trial court did not prohibit the introduction of evidence tending to show that Pettaway shot Taylor. The court's ruling did, however, make inadmissible evidence offered *only* to prove that Pettaway pulled the trigger. For example, the trial judge stated that he would not allow Lowana Walker to testify that she saw Pettaway shoot Taylor because "it is irrelevant because being offered to prove not that he aided and abetted her or anybody else, but that he actually did the killing."[5] The judge stated that he would allow the prosecution to introduce evidence supporting *both* theories,[6] but explained that he would "instruct the jury that you cannot convict this man on any theory that he personally used the gun." Once this position was made clear, the prosecution admitted that it could present no evidence relevant to an aiding and abetting theory, and the trial judge dismissed the case. In other words, as in *Grady*, the trial court correctly barred reprosecution on a theory the prosecution had tried and failed to prove before.

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[4] Although the prior proceedings in *Vitale* and *Grady* resulted in convictions, an acquittal that has collateral estoppel effect has essentially the same double jeopardy ramifications as a conviction. *See North Carolina* v. *Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).

[5] Whether such a ruling would have been correct is not at issue in this appeal.

If the state is allowed to proceed on the theory that Pettaway pulled the trigger himself, it is possible that the second jury would convict Pettaway by reaching a conclusion directly contrary to that reached by the jury in the first trial. This possibility is abhorrent to the principles underlying the Double Jeopardy Clause. *See Dowling* v. *United States*, 493 U.S. 342, 347-49, 110 S.Ct. 668, 671-72, 107 L.Ed.2d 708 (1990) ("A second prosecution [in *Ashe*] was impermissible because, to have convicted the defendant in the second trial, the second jury had had to have reached a . . . conclusion" directly contrary to that of the first jury. (Citing *Ashe*, 397 U.S. at 445, 90 S.Ct. at 1195.). Underlying the Double Jeopardy Clause is the idea, "deeply ingrained in at least the Anglo-American system of jurisprudence,"

> "that the State with all its resources and power should not be allowed to make

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[6] The trial court indicated that it would allow the prosecution to present evidence relevant to an aiding and abetting theory, such as ballistic evidence regarding the gun used and the bullets found in Pettaway's possession.

> repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . ." *Green* v. *United States*, 355 U.S. 184, 187 [78 S.Ct. 221, 223, 2 L.Ed.2d 199] (1957). Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged. *See, e.g., Tibbs* v. *Florida*, 457 U.S. 31, 41 [102 C.Ct. 2211, 2217, 72 L.Ed.2d 652] (1982) (noting that the Double Jeopardy Clause "prevents the state from honing its trial strategies and perfecting its evidence through successive attempts at conviction").

Grady, 110 S.Ct. at 2091-92.

Allowing the state to reprosecute Pettaway for murder on the theory that he was the actual perpetrator of the murder permits the state to remedy the flaws it perceives as having been fatal to its case the first time, and to attempt to convince a second jury of that which it tried and failed to prove to the first jury. "Having received one fair opportunity to offer whatever proof it could assemble, the State is not entitled to another." *Bullington*, 451 U.S. at 446, 101 S.Ct. at 1862 (quotation omitted).

For these reasons, we hold that it would violate double jeopardy principles if, on retrial of the second offense, the prosecution attempted to prove that Pettaway did personally use the gun. We must, however, emphasize the limits of our holding. What we hold is that when enhancement of the penalties for a substantive offense is presented to the trial jury for its determination beyond a reasonable doubt, and the jury expressly determines the enhancement issue adversely to the prosecution, the prosecution cannot seek to prove the contrary at a second trial of the substantive offense, where it is not clear that there was simply an inconsistent verdict in the first trial. Of course, the prosecution could still seek to prove Pettaway guilty of first degree murder under an aiding and abetting theory, but, as we have pointed out, the prosecutor expressly eschews any intention to do so. Thus, because this prosecution must be based upon personal use of a firearm or nothing, we are constrained to hold that it cannot proceed at all.

IV

The district court's order is REVERSED and the cause is REMANDED with instructions to issue the writ of habeas corpus with respect to Pettaway's reprosecution for murder.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES PETTAWAY, Petitioner, v. CHARLES PLUMMER, Sheriff of Alameda County, Respondent.	No. C 89 2601 SC ORDER RE PETITIONER'S WRIT OF HABEAS CORPUS

I. Introduction

Petitioner currently is awaiting retrial for the murder of Karen Taylor. He was convicted of her murder in the first degree in an earlier trial, but the state court of appeals reversed the conviction and remanded it for retrial. Petitioner now brings a writ of habeas corpus, claiming that his retrial would violate the fifth amendment's proscription against double jeopardy.

II. Facts

It was established at Petitioner's trial that on May 1, 1981 Petitioner and his girlfriend Lowana Walker were at the home of the deceased Karen Taylor. Another person, Michael Seals, was also present. Sometime later, Ms. Walker handed Petitioner a gun with which he shot Mr. Seals in the back of the neck. Mr. Seals then fainted, but when he regained consciousness he saw Petitioner and Ms. Walker leaving through the front door. Ms. Taylor subsequently was found dead in the bathroom with two bullet holes in her head. *People v. Pettaway*, 206 Cal.App.3d 1312 (1988).

Petitioner was charged and convicted of one count of murder and one count of attempted murder. At trial the prosecution tried the case on the theory that Petitioner had personally shot Mr. Seals and Ms. Taylor. The jury initially was not given an instruction on aiding and abetting. During the third day of deliberations, however, the jury requested and received an instruction from the court regarding aiding and abetting.

With respect to both charges, the jury was also given sentence enhancement instructions to determine if Petitioner had personally shot the gun or inflicted great bodily injury, or both. Cal. Pen. Code §§ 12022.5, 12022.7. With respect to the attempted murder charge the jury found them both to be true; with respect to the murder charge, however, the jury found them to be untrue.

On appeal, the court of appeals reversed Petitioner's murder conviction because it determined that the aiding and abetting instruction given to the jury constituted reversible error.

On remand, Petitioner moved to preclude the prosecution from proceeding on a theory that Petitioner shot Ms. Taylor and from referring to Petitioner as the actual killer. Petitioner argued that because the jury had found the sentence enhancements to be untrue with respect to the murder charge, the doctrines of collateral estoppel and double jeopardy barred the prosecution from advancing a theory that Petitioner shot Ms. Taylor. The trial court agreed with Petitioner and because the prosecution said it had insufficient evidence to proceed to trial solely on an aiding and abetting theory, the trial judge dismissed the murder count against Petitioner.

On appeal, however, the court reversed the trial court, holding

> that where a defendant has been convicted of first degree murder at his first trial and that conviction is reversed on appeal because of instructional error, the defendant may be retried as the murder perpetrator despite negative jury findings, at the first trial, on the personal use of handguns and personal infliction of great bodily injury enhancement allegations.

Pettaway, 206 Cal.App.3d at 1315. The California Supreme Court denied review of the case.

Petitioner now petitions this Court for a writ of habeas corpus, claiming that a retrial on the theory that he shot Ms. Taylor would violate the Fifth Amendment's proscription against double jeopardy.

II. Analysis

A. Timeliness of the Petition

Although normally federal courts may not interfere with pending state criminal proceedings, *Younger v. Harris*, 401 U.S. 37 (1971), a writ of habeas corpus may issue to prevent a retrial that would violate the Double Jeopardy Clause. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 300-302 (1984). In this case, Petitioner claims that a retrial under the legal theory that he shot Ms. Taylor would violate the Double Jeopardy Clause. Although it is theoretically possible that Petitioner could be tried solely on an aiding and abetting theory, thus avoiding any double jeopardy concerns, because the prosecution has made it clear that it only will go to trial if it can proceed on the theory that Petitioner may have shot Ms. Taylor, it is appropriate for this Court to rule on Petitioner's request for a writ.

B. Double Jeopardy and Collateral Estoppel

The Fifth Amendment's Double Jeopardy Clause states that no person shall "be subject for the same offense to be put in jeopardy of life or limb." U.S. Const. amend. V.

> The underlying idea, one that is deeply ingrained in at least the anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to

> convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184 (1957).

In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court opined that the constitutional guarantee against double jeopardy comprises the doctrine of collateral estoppel. "'Collateral estoppel' . . . means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties. . . ." 397 U.S. at 443.

When considering a collateral estoppel claim it is necessary for a court to determine if a prior rational jury could have "grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration. This inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" 397 U.S. at 444.

C. Discussion

With the foregoing principles in mind, the court turns to the circumstances of this case. Under California law, the direct perpetrator of a crime and an aider and abettor are equally guilty. *People v. Beeman*, 35 Cal.3d 547, 554-55 (1984). Accordingly, Petitioner argues that the jury must have returned its guilty verdict on the murder charge against him either because it believed he personally shot Ms. Taylor or because it believed he only aided and abetted in her killing. Because the jury determined that the sentence enhancements were untrue, however, Petitioner concludes that the jury must have convicted him on an aiding and abetting theory.

The state argues that the jury's verdict does not mean necessarily that the jury decided definitely that Petitioner did not shoot Ms. Taylor. Rather, according to the state, the "jury must have had an unresolved doubt or a reasonable doubt as to whether petitioner was the actual killer or an aider and abettor, but found beyond a reasonable doubt that he was one or the other." Memorandum of Points and Authorities in Support of Answer to Petition for Writ of Habeas Corpus, 14-15. If this were the case, according to the state, then the jury's enhancement finding would not imply that it decided definitively that Petitioner did not personally shoot Ms. Taylor.

The fact that the jury requested an aiding and abetting instruction after three days of deliberation certainly buttresses Petitioner's position. That fact coupled with the fact that the jury found the sentence enhancements to be untrue could cause a reasonable person to conclude that the jury believed the Petitioner did not shoot Ms. Taylor, but only aided and abetted in her murder. Double jeopardy and collateral estoppel, however, are not domains for speculation.

As noted earlier, this Court's inquiry must be done in a "practical frame with an eye to all the circumstances of the proceedings." 397 U.S. at 444. A "practical frame" implies eschewing formalism when common sense dictates otherwise. "[T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." 397 U.S. at 444.

The inquiry this court must make is whether there is another issue upon which the jury could have grounded its verdict other than the one petitioner is attempting to foreclose. If another issue possibly could have been considered, then Petitioner's collateral estoppel claim fails.

Petitioner argues that the jury grounded its verdict on the finding that he did not use the gun, i.e., that he only aided and abetted in Ms. Taylor's killing. The determination that Petitioner did not personally shoot Ms. Taylor is the "issue" which Petitioner seeks to foreclose at trial. Thus, if the court finds that the jury's verdict did not rely necessarily on this determination, collateral estoppel does not foreclose the adjudication of that determination anew at retrial.

As the state articulates in its memorandum, the jury was presented with an either/or situation where it was not necessary to choose between the alternatives to bring back a guilty verdict. To find Petitioner guilty of first degree murder the jurors merely had to find beyond a reasonable doubt that Petitioner either killed Ms. Taylor or aided and abetted in her killing; it did not have to decide which of the two alternatives was fact. It only had to determine as a fact that one of the two alternatives occurred, without choosing between the two. Consequently, when the jury found the sentence enhancement to be untrue, it did not determine necessarily that Petitioner did not kill Ms. Taylor; it could have decided that it was not sure of that fact beyond a reasonable doubt, but concomitantly not have intended to limit the verdict's basis solely to the aiding and abetting theory. That is, in concluding only that Petitioner either killed Ms. Taylor or aided and abetted in her murder, the jury was not obligated to find beyond a reasonable doubt that he personally used the gun. Thus, it is possible that the verdict, when considered as a whole, did not rely on the determination that Petitioner did not personally kill Ms. Taylor, but was grounded on a determination that Petitioner either personally shot Ms. Taylor or aided and abetted in her killing, without deciding between the two alternatives.[1]

If the court were to accept Petitioner's argument it would be abandoning its responsibility to decide this case in a "practical frame." The court must look beyond the isolated sentence enhancement findings, and consider all the circumstances of the verdict. When this is done, it is clear to the court that the sentence enhancement findings should not invoke collateral estoppel and prevent Petitioner from being retried on the theory that he personally shot Ms. Taylor.

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[1] Using simpler terms, the jury's reasoning could have been as follows: If (A or B) the Defendant is guilty. We know (A or B) occurred. Therefore, Defendant is guilty. We do not know, however, that A alone occurred; we also do not know that B alone occurred. Therefore, we cannot conclude that A alone is true or that B alone is true.

III. Conclusion

In accordance with the foregoing, Petitioner's writ of habeas corpus is hereby DENIED.

IT IS SO ORDERED.

Dated: December 27, 1989.

/s/ SAMUEL CONTI

United States District Judge

APPENDIX C

PEOPLE *v.* PETTAWAY
206 Cal.App.3d 1312; 254 Cal.Rptr. 436 [Dec. 1988]

[No. A037224, First Dist., Div. Two. Dec. 29, 1988.]

THE PEOPLE, Plaintiff and Appellant, v.
JAMES PETTAWAY, Defendant and Respondent.

SUMMARY

Defendant was charged with one count of murder and a second count of attempted murder in an information alleging as enhancements personal use of a handgun (Pen. Code, § 12022.5) and personal infliction of great bodily injury (Pen. Code, § 12922.7) during the commission of both offenses. The case was tried on the theory that defendant was the perpetrator of both shootings. The jury returned verdicts of guilty for both the first degree murder and the attempted murder, but found the enhancement allegations not true as to the murder. Defendant's conviction was reversed on appeal on account of instructional error, and, at retrial, defendant moved to preclude the prosecutor from proceeding to trial on a theory that defendant shot the murder victim and from referring to defendant as the actual killer. The trial court agreed, on double jeopardy and collateral estoppel principles, and dismissed the information when the People declined to proceed against defendant on an aider and abettor theory. The People appealed. (Superior Court of Alameda County, No. 73299, Martin N. Pulich, Judge.)

The Court of Appeal reversed the judgment of dismissal and remanded for trial in accordance with its

views. The court held that where a defendant has been convicted of first degree murder at his first trial and that conviction is reversed on appeal because of instructional error, the defendant may be retried as the murder perpetrator despite negative jury findings, at the first trial, on the personal use of a handgun and personal infliction of great bodily injury enhancement allegations. The court further held that double jeopardy principles precluded defendant's retrial on the enhancement allegations which the jury determined in his favor at the first trial. (Opinion by Benson, J., with Rouse, J.,* concurring. Separate concurring and dissenting opinion by Kline, P. J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1d) **Criminal Law § 29--Former Jeopardy--Effect of Reversal on Appeal--Retrial--Murder--Negative Firearm Use Finding at First Trial.**--A defendant whose conviction of first degree murder was reversed on appeal because of instructional error could properly be retried as the murder perpetrator, despite negative jury findings at the first trial on enhancement allegations that defendant personally used a handgun and personally inflicted great bodily injury during the murder. The negative finding on the enhancements was not essential to the judgment of conviction of first degree murder at the first trial, did not impose any finality on the merits, and thus did not collaterally estop the prosecution from retrying defendant as the perpetrator nor preclude the presentation of admissible evidence to prove that theory of guilt. The use enhancement was relevant only to punishment and was superfluous to determination of the defendant's guilt or innocence of murder at the second trial.

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* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

[Limitations under double jeopardy clause of Fifth Amendment upon state criminal prosecutions--Supreme Court Cases, note, 67 **L.Ed.2d** 831. See also **Cal.Jur.3d (Rev)**, Criminal Law, § 2320; **Am.Jur.2d**, Criminal Law, § 266.]

(2) **Criminal Law § 25--Former Jeopardy--What Constitutes Jeopardy--Collateral Estoppel.**--The doctrine of res judicata applies to criminal as well as civil proceedings, and collateral estoppel is not only a requirement of due process, but included within the constitutional guaranty against double jeopardy.

(3) **Criminal Law § 480--Judgment--Effect--Collateral Estoppel.**--The doctrine of collateral estoppel is applicable in criminal cases, and means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. It bars relitigation of an issue decided at a previous proceeding if the issue

necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated, the previous proceeding resulted in a final judgment on the merits, and the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding.

(4) **Criminal Law § 480--Judgment--Effect--Collateral Estoppel--Purposes.**--The purposes justifying application of the doctrine of collateral estoppel are: promoting judicial economy by minimizing repetitive litigations, preventing inconsistent judgments which undermine the integrity of the judicial system, and providing repose by preventing a person from being harassed by vexatious litigation. In deciding whether the doctrine is applicable in a particular situation a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case.

(5a,b) **Criminal Law § 29--Former Jeopardy--Effect of Reversal on Appeal--Retrial.**--Double jeopardy will not bar retrial of a defendant who has succeeded in overturning his conviction. An exception to the general rule lies where a defendant has been impliedly acquitted of an offense at the first trial. The protection of the double jeopardy clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy.

(6) **Criminal Law § 480--Judgment--Effect--Collateral Estoppel.**--Collateral estoppel is an equitable concept based on fundamental principles of fairness,

and means that a party ordinarily may not relitigate an issue that was fully and fairly litigated on a previous occasion. It is only applicable where the issue necessarily decided at the previous trial is identical to the one sought to be relitigated.

(7) **Criminal Law § 29--Former Jeopardy--Effect of Reversal on Appeal--Sentence--Enhancement Finding.**--Where defendant's conviction of first degree murder was reversed on appeal because of instructional error, and the jury at the first trial made negative findings on sentence enhancement allegations of handgun use and personal infliction of great bodily injury, double jeopardy principles precluded defendant's retrial on the enhancement allegations. A defendant should not be required to risk being given greater punishment on a retrial for the privilege of exercising his right to appeal.

COUNSEL

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, John Sugiyama, Assistant Attorney General, David D. Salmon, Clifford K. Thompson, Jr., and Blair W. Hoffman, Deputy Attorneys General, for Plaintiff and Appellant.

Rene E. Torres, under appointment by the Court of Appeal, Robert K. Calhoun, Jr., Neoma Kenwood and J. Bradley O'Connell for Defendant and Respondent.

OPINION

BENSON, J.--Pursuant to Penal Code section 1238, subdivision (a)(8), the People appeal from the trial court's dismissal of a murder charge against defendant James Anthony Pettaway. We will reverse the judgment. In doing so we will disagree with *People* v. *White* (1986) 185 Cal.App.3d 822 [231 Cal.Rptr. 569], an opinion rendered by our colleagues in Division Five of this District. **(1a)** We hold that where a defendant has been convicted of first degree murder at his first trial and that conviction is reversed on appeal because of instructional error, the defendant may be retried as the murder perpetrator despite negative jury findings, at the first trial, on the personal use of a handgun and personal infliction of great bodily injury enhancement allegations.

Our summary of the pertinent underlying facts in this case is taken from an earlier unpublished appellate decision by Division One of this District following defendant's conviction of first degree murder and attempted murder. On May 1, 1981, defendant and his girlfriend Lowana Walker were at the home of Karen Taylor. Another man, Michael Seals, was also present. At some point, Lowana handed defendant a gun and defendant shot Michael in the back of the neck. Michael then fainted. When he regained consciousness, he saw defendant and Lowana leave through the front door. Karen's dead body was later found in the bathroom. She had been shot twice.

Defendant was charged with one count of murder and a second count of attempted murder. The information also alleged as enhancements, personal use of a handgun (Pen. Code, § 12022.5) and personal infliction of great bodily injury (Pen. Code, § 12022.7) during the commission of both offenses. The prosecution tried the case on the theory that defendant had been the perpetrator of both shootings. Neither party requested and the trial court initially did not give instructions on aiding and abetting. However, during the third day of deliberations the jury requested the following: "Please explain the law concerning complicity, for example, in this case may the defendant be convicted of murder or attempted murder without having personally fired the bullets?" The court, responding to this inquiry, then instructed in accordance with former CALJIC Nos. 3.00 and 3.01. Thereafter, the jury returned verdicts of guilty for both the first degree murder and the attempted murder. With respect to the personal use of a handgun and great bodily injury allegations, the jury found them to be true as to the attempted murder but not true as to the murder.

On appeal, Division One of this court reversed defendant Pettaway's murder conviction for *Beeman* error (*People* v. *Beeman* (1984) 35 Cal.3d 547 [199 Cal.Rptr. 60, 674 P.2d 1318]), i.e., that the language of CALJIC 3.01 as it then existed "removed from the jury's consideration the issue of whether appellant shared in the intent to commit murder." The attempted murder conviction remained undisturbed.

On remand the public defender, relying principally on *People* v. *White*, *supra*, 185 Cal.App.3d 822, moved to preclude the prosecutor from proceeding to trial on a theory that defendant shot Karen and from referring to defendant as the actual killer. The public defender argued that because the jury determined not true the enhancement allegations with respect to the murder charge, the principles of res judicata, collateral estoppel and/or equitable estoppel, double jeopardy and due process required that result. The trial court, determining that it was bound by *People* v. *White*, *supra*, 185 Cal.App.3d 822, agreed with the defendant's position and, since the prosecution refused to proceed on an aider and abettor theory, dismissed the murder count against defendant.

On appeal the People concede that defendant may not be retried on the enhancement allegations that the jury found not true. They contend, however, that the trial court erred in ruling that evidence demonstrating defendant was the actual perpetrator in Karen's killing could not be used when retrying the murder count. They argue that *People* v. *White*, *supra*, 185 Cal.App.3d 822, was wrongly decided or at least distinguishable from the ruling below.

During the hearing of defendant's motion it was the prosecutor's position that he could not in good faith urge any theory to the trier of fact other than that defendant had shot and killed Karen. The prosecutor recited to the court the substance of the evidence available to support his position. A summary of that offer is as follows:

> Michael's testimony that he saw defendant "secure possession of a handgun and walk behind him almost immediately preceding Michael being shot from behind;"
>
> Michael's testimony that "he saw no other persons in the room, no other persons in the house other than himself, Karen . . .

[Lowana] . . . and the defendant"; that "when he was shot . . . he was looking at Karen Taylor who was alive and well and [Lowana] Walker";

ballistic testimony that "the expended cartridges found in the house were .32 caliber Winchester Western slugs. When [defendant] was arrested . . . in the state of Texas . . . he was found in possession of .32 caliber Winchester Western ammunition, seven cartridges to be exact";

testimony from defendant's employer that ". . . during the time of this particular incident . . . [defendant] acknowledged being in possession of [the employer's] gun which, in fact, was the murder weapon";

circumstantial evidence ". . . that the same weapon [used to shoot Michael] was also the weapon that killed Karen Taylor";

that the "cartridges that [defendant's employer] kept with the gun, . . . some of that ammunition was missing. . .";

that Lowana Walker, had given a tape-recorded statement to the Oakland police department wherein she stated: "that she was present, and saw [defendant] go behind Michael Seals and shoot him from behind

> . . . that [defendant] then chased Karen Taylor into a back room. [Lowana] remained in the dining room . . . she heard approximately four shots and after approximately 10 or 15 minutes of silence . . . she went to the bathroom and saw the defendant . . . standing over Miss Taylor's body with the . . . gun";
>
> that while Lowana "had invoked the Fifth Amendment privilege" at the preliminary hearing and during the first trial, she "is presently available and willing to testify in accordance with the taped statement. . . ."

Because we have profound disagreement with the holding reached by our colleagues in *People* v. *White*, *supra*, 185 Cal.App.3d 822, a case concerning the identical issue we are called upon to address, it is appropriate to begin our discussion with a review of the *White* decision. The case involved a drug-related double murder. Defendant White was apprehended, tried and convicted of two counts of first degree murder and firearm possession. However, the jury found the firearm-use allegations not true. An appeal followed and the murder convictions were reversed due to the improper admission of hearsay testimony. The case was retried and the jury convicted White on both counts of first degree murder. White again appealed contending that the principles of collateral estoppel and res judicata prohibited his prosecution in the second trial as the actual killer. He argued that the trial court committed error in denying his motion to prohibit the prosecution from proceeding on the theory that he fired the fatal shots.

Division Five of this court agreed with White's position and, in analyzing the problem, stated: "The doctrine of collateral estoppel prevents the relitigation of issues decided between the parties in earlier proceedings upon which a judgment on the merits of the issues has become final. [Citations.] In the instant case, the issue of appellant's use of a gun in the commission of these particular homicides was litigated between the parties and decided finally in appellant's favor in the first trial. In the second trial the prosecution sought to relitigate the same issue. It argued that appellant was guilty of murder if he was 'the actual perpetrator, that it was Mr. Willie White out there who pulled the trigger on one of the firearms or both of them that killed these people.' Appellant's use of a gun was resolved adversely against the prosecution in the first trial, and should not have been relitigated in the second. The prosecution is not prevented from proceeding on the theory that appellant supplied the weapons or otherwise participated as a principal. (See Pen. Code, 31.) What it cannot do is relitigate the fact of appellant's *use* of a gun in these homicides, since that issue was decided against it in the first trial. Principles of double jeopardy and due process which incorporate the doctrine of collateral estoppel preclude such action." (*People* v. *White*, *supra*, 185 Cal.App.3d at pp. 827-828.)

(2) As acknowledged in *White*, ". . . the doctrine [of res judicata] applies to criminal as well as civil proceedings. . . . [*Sealfon* v. *United States* (1948) 332 U.S. 575, 578 [92 L.Ed. 180, 68 S.Ct. 237]] . . . [and] collateral estoppel [is] not only a requirement of due process, but

included within the 'Fifth Amendment's guarantee against double jeopardy.' [*Ashe* v. *Swenson* (1970) 397 U.S. 436, 443-445.]" (*People* v. *White*, *supra*, 185 Cal.App.3d at pp. 826-827.)

(3) As explained in *Ashe* v. *Swenson* (1970) 397 U.S. 436 [25 L.Ed.2d 469, 90 S.A. 1189], "'collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (*Id.* at p. 443 [25 L.Ed.2d at p. 475].)

"Traditionally, collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding 'if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].'" (*People* v. *Sims* (1982) 32 Cal.3d 468, 484 [186 Cal.Rptr. 77, 651 P.2d 321], quoting *People* v. *Taylor* (1974) 12 Cal.3d 686, 691 [117 Cal.Rptr. 70, 527 P.2d 622].)

(4) The purposes justifying application of the doctrine of collateral estoppel have been defined as: (1) promoting judicial economy by minimizing repetitive litigation; (2) preventing inconsistent judgments which undermine the integrity of the judicial system; and (3) providing repose by preventing a person from being harassed by vexatious litigation. (*People* v. *Taylor*, *supra*, 12 Cal.3d at p. 695.) *Taylor*, citing *Teitelbaum Furs, Inc.*

v. *Dominion Ins. Co. Ltd.* (1962) 58 Cal.2d 601, 605 [25 Cal.Rptr. 559, 375 P.2d 439], also observed: "In deciding whether the doctrine is applicable in a particular situation a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case." (*Id.* at p. 695.)

In reaching its conclusion that collateral estoppel precluded retrial of the defendant as the perpetrator, the *White* court placed considerable reliance on *People* v. *Asbury* (1985) 173 Cal.App.3d 362 [218 Cal.Rptr. 902], a case which utilized the doctrine of "collateral estoppel" to bar the retrial of a defendant on a felony murder theory. We believe *White*'s reliance on Asbury was misplaced, although understandably so. In our judgment the proper rationale for the conclusion reached in *Asbury* was the principle of double jeopardy and not collateral estoppel. A discussion of *Asbury* is required.

Asbury's original trial resulted in his conviction of first degree murder and robbery. At the same time the jury rejected a special circumstance allegation that the murder occurred during the course of the robbery. (Pen. Code, § 190.2, subd. (a)(17).) The jury also concluded that although the defendant had used a deadly weapon during the murder (Pen. Code, § 12022, subd. (b)) he had not done so during the robbery nor had he inflicted great bodily injury during the robbery (Pen. Code, § 12022.7). Asbury appealed and his conviction was reversed for reasons relating to his self-representation at trial.

Asbury was retried. During the second trial the court refused to instruct the jury on premeditated murder, determining there was insufficient foundation for the instruction. The case was submitted to the jury on felony murder pursuant to Penal Code section 189.[1] Asbury was again convicted of first degree murder and robbery.

The *Asbury* court, in reversing the conviction observed: "[In] finding the defendant guilty of first degree murder . . . the jury necessarily . . . determined that the murder had occurred during the course of the robbery--a finding in apparent conflict with the verdict in the earlier proceeding rejecting the robbery special circumstance allegation and the allegations of deadly weapon use and infliction of great bodily injury during the robbery." (*People* v. *Asbury*, *supra*, 173 Cal.App.3d at p. 365.) The court held that because the jury had ". . . necessarily rejected the notion that the murder occurred during the course of the robbery" (*ibid.*) the doctrine of collateral estoppel barred the felony murder conviction at the second trial.

The *Asbury* holding was predicated on the "virtually indistinguishable" language of Penal Code section 190.2, subdivision (a)(17) and Penal Code section 189. The former statute defines the special circumstances as specifying that the murder occur "in the commission of" robbery, while the latter statute defines felony murder as murder "in the perpetration of" robbery. (*People* v. *Asbury*, *supra*, 173 Cal.App.3d at p. 365.) "In light of the

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1. Penal Code section 189 provides, inter alia: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under section 288, is murder of the first degree; and all other kinds of murders are of the second degree. . . ."

plain meaning of these statutes" (*Ibid.*) the court accepted Asbury's contention that "collateral estoppel" barred the felony murder conviction.

As previously indicated, in our judgment the principle of double jeopardy controlled the issue before the *Asbury* court, not collateral estoppel. When the first *Asbury* jury decided that the murder had not occurred in the commission of the robbery, that finding *impliedly acquitted Asbury* of the *offense of first degree murder, which, as defined in Penal Code section 189, includes murder in the perpetration of a robbery*. Using the language of Penal Code section 1023, the jeopardy statute not referred to in the *Asbury* opinion, felony murder was an offense "of which [*Asbury*] might have been convicted under the accusatory pleading" at the first trial.[2]

Our dissenting colleague argues that "the theory of implied acquittal . . . is correctly applied only in relation to a charged or necessarily included offense" and, therefore, "has no application . . . in *Asbury* . . . ." (Dis. opn., *post*, p. 1335.) The argument is premised on Justice Kline's statement, ". . . felony murder is not an offense 'necessarily included' within the offense of first degree murder, ...' (Dis. opn., *post*, p. 1333.) While we certainly agree with the general proposition that not every first degree murder necessarily includes a felony murder as defined in Penal Code section 189 (the *White* and instant cases for example), the patently evident fact of the matter is that felony murder was necessarily included in the first *Asbury* trial. There, the special circumstance allegation requiring that the murder occur "in the commission of" robbery, language which, we repeat, the *Asbury* court found "virtually indistinguishable" from the felony murder definition of murder "in the perpetration of" robbery, provided an element that elevated the crime from second degree murder to first degree murder. Asbury could not have murdered in the commission of robbery without, at the same time, subjecting himself to a first degree murder conviction under the felony murder rule.

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[2] Asbury was originally charged with murder pursuant to Penal Code section 187. Our Supreme Court has recognized that the "usual manner" of charging the crime of murder is "without specification of degree." (*People* v. *McDonald* (1984) 37 Cal.3d 351, 379 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011].) Penal Code section 187, subdivision (a), defines murder as the "unlawful killing of a human being, or a fetus, with malice aforethought." The degrees of murder are defined in Penal Code section 189. A murder charge pursuant to section 187 may include first and second degree murder.

(5a) It is fundamental that double jeopardy will not bar retrial of a defendant who has succeeded in overturning his conviction. (*North Carolina* v. *Pearce* (1969) 395 U.S. 711, 719-720 [23 L.Ed.2d 656, 665-666, 89 S.Ct. 2072].) This rule rests on the premise that the original conviction is nullified and "the slate wiped clean." (*Id.* at p. 721 [23 L.Ed.2d at p. 667]; see *Bullington* v. *Missouri* (1980) 451 U.S. 430, 442 [68 L.Ed.2d 270, 281, 101 S.Ct. 1852].)

A well-established exception to the general rule enunciated in *North Carolina* v. *Pearce* lies where a defendant has been *impliedly acquitted of an offense* at the first trial. In *Gomez* v. *Superior Court* (1958) 50 Cal.2d 640, 652 [328 P.2d 976], our Supreme Court observed: "Double jeopardy attaches when [defendants] are threatened with a second trial on the charge of grand theft of which they were impliedly acquitted at the first trial where they were found guilty only of petty theft." In *People* v. *Mercer* (1962) 210 Cal.App.2d 153, 161 [26 Cal.Rptr. 502], the court stated: ". . . the jury returned its verdict, finding appellant guilty of second degree murder, thus impliedly finding that the killing did not take place during the perpetration of a robbery by the appellant of the decedent. The result of this implied finding was to acquit the appellant of the charge of first degree murder, thus precluding any subsequent trial of appellant on such charge." *Gomez* and *Mercer* follow the lead of *Green* v. *United States* (1957) 355 U.S. 184 [2 L.Ed.2d 199, 204, 78 S.Ct. 221, 61 A.L.R.2d 1119]. In *Green*, the defendant was indicted for first degree murder. At trial the jury was instructed that it could convict on either first or second degree murder. The jury convicted on second degree, but the conviction was reversed on appeal. The United States Supreme Court held '". . . that a retrial on the first degree murder charge was barred by the Double Jeopardy Clause, because the defendant was forced to run the gantlet once on that charge and the jury refused to convict him.' (*Id.* at p. 190; see also *Price* v. *Georgia*, 398 U.S. 323 (1970).)" (*Bullington* v. *Missouri*, *supra*, at p. 443 [68 L.Ed.2d at p. 281].)

The issue before the *Asbury* court is decidedly different from that which confronted the *White* court or which faces this court. In *Asbury*, the first degree felony murder offense was decided adversely to the People at the first trial, resulting in an implied acquittal of that charge of which he might have been convicted under the accusatory pleading. This implied acquittal and the resulting attachment of jeopardy gave finality on the merits to the felony murder offense. In contrast, White, and Pettaway here, both convicted of first degree murder at the first trial, were not beneficiaries of a jury determination that impliedly acquitted them of the offense of first degree murder. There was no finality on the merits as to the offense charged.

The court in *People* v. *White*, we respectfully submit, merely adopted the erroneous "collateral estoppel" label offered by *Asbury* without an appreciation that finality on the merits had been realized in *Asbury* by the attachment of jeopardy due to an implied acquittal of the felony murder offense.

As we pointed out earlier, a prerequisite to barring litigation of an issue by collateral estoppel is that ". . . "(2) the previous (proceeding) resulted in a final judgment on the merits. . . ." (*People* v. *Sims*, *supra*, 32 Cal.3d 484.) The Ninth Circuit in *Newton* v. *Superior Court of California* (9th Cir. 1986) 803 F.2d 1051, 1057, quoting an earlier decision of that court (*United States* v. *Hernandez* (9th Cir. 1978) 572 F.2d 218), describes the collateral estoppel doctrine in this manner: '"When an issue of fact or law is actually litigated and determined by a final and valid judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim. [Citation.]"' The *Newton* court, citing *Ashe* v. *Senson*, *supra*, 397 U.S. 444, observes that inquiry into application of the doctrine '"must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."'

(1b) Contrary to the holding in *People* v. *White* we conclude that a negative finding on the enhancements was not essential to the judgment of conviction of first degree murder reached at the first trial, does not impose any finality on the merits and, therefore, does not collaterally estop the prosecution from retrying the appellant as the perpetrator nor preclude the presentation of admissible evidence to prove that theory of guilt.

Several California cases clearly demonstrate the adjunctive nature of an enhancement. Our Supreme Court in *In re Culbreth* (1976) 17 Cal.3d 330, 333 [130 Cal.Rptr. 719, 551 P.2d 23], held that a firearm-use enhancement under Penal Code section 12022.5 ". . . does not prescribe a new offense but merely additional punishment for an offense in which a firearm is used. [Citation.] [¶] The legislative purpose of section 12022.5 has been described as deterrence, i.e., to deter the use of firearms on subsequent occasions." (See also *People* v. *Henry* (1970) 14 Cal.App.3d 89, 92 [91 Cal.Rptr. 841].)

Again acknowledging that "'section 12022.5 does not prescribe a new offense but merely additional punishment for an offense in which a firearm is used,'" our Supreme Court, adhering to the view adopted by a majority of Court of Appeal decisions, held that "'an allegation of firearm use for purposes of Penal Code section 12022.5 is not to be considered in determining whether the accusation encompasses a lesser included offense.'" (*People* v. *Wolcott* (1983) 34 Cal.3d 92, 100-101 [192 Cal.Rptr. 748, 665 P.2d 520].) The court reasoned that to allow a use enhancement to be considered a part of the accusatory pleading for the purpose of defining lesser included offenses raised due process objections. It explained: ". . . an offense not necessarily included as a matter of law may become such because of the 'specific language of the accusatory pleading.' [Citation.] That rule rests on principles of due process--that a defendant cannot be convicted of a charge unless he has received notice from the accusatory pleading that he may be called upon to defend against the charge. [Citation.] The application of those principles to an enhancement allegation, however, is unclear *since that allegation becomes relevant only if the defendant is convicted of a substantive crime.*" (Italics added.) (*Id.* at p. 101.)

The question of whether a jury's finding that defendant did not personally use a firearm would collaterally estop his conviction of murder was explored in *People* v. *Nunez* (1986) 183 Cal.App.3d 214 [228 Cal.Rptr. 64]. In *Nunez* the defendant was convicted of conspiracy to commit murder and first degree murder. The jury found a firearm-use allegation not true. In separate trials for the same crimes the alleged coconspirators were acquitted of the murder and conspiracy charges though found guilty of lesser offenses. On appeal defendant Nunez contended, inter alia, that the prosecution should have been barred from relitigating the issues of malice and defendant's motive of killing for financial gain. He argued that "since the jury found he did not personally use a firearm . . . he was not found to be the direct perpetrator of the murder." Further, that since it had been determined (in the separate trial) than an alleged coconspirator (Medina) entertained no malice, the defendant therefore entertained no malice. (*Id.* at p. 225.)

The appellate court rejected this contention pointing out that it was based on the speculative assumption that the jury necessarily found Nunez an aider and abettor and not a direct perpetrator. The court held that "[a] jury's finding on an alleged enhancement that an accused was not armed with a firearm or did not personally use a firearm does not necessarily mean that the accused was not a direct perpetrator of the crime." (*People* v. *Nunez*, *supra*, 183 Cal.App.3d at pp. 225-226.)

The *Nunez* court followed similar reasoning in *People* v. *Lopez* (1982) 131 Cal.App.3d 565 [182 Cal.Rptr. 563] where the defendant claimed that "'the negative finding on the enhancement allegation is equivalent to a special verdict on the factual question of whether [he] personally used a firearm.'" (*People* v. *Nunez*, *supra*, 183 Cal.App.3d at p. 226.) For convenience we will quote verbatim the *Nunez* court's reference to the *Lopez* decision:

"In *People* v. *Lopez* (1982) 131 Cal.App.3d 565, Lopez and three other men were charged with assault with a deadly weapon and personally using a firearm pursuant to section 12022.5. The charges stemmed from an incident in which the defendant and the other men were responsible for shooting a rifle at a group of people in the park. The majority of the evidence indicated that Lopez fired the rifle. Lopez ultimately was convicted of six counts of assault with a deadly weapon, but the jury found he did not personally use a firearm in committing the offense.

"Lopez argued the evidence was insufficient to support findings that he aided and abetted an assault with a deadly weapon. He contended the court could not analyze the evidence for sufficiency under the theory that he was the direct perpetrator because the jury found he did not personally use a firearm. As the appellate court phrased Lopez's argument, 'he claims the negative finding on the enhancement allegation is equivalent to a special verdict on the factual question of whether he personally used a firearm.' (*People* v. *Lopez*, *supra*, 131 Cal.App.3d at p. 569.)

"The *Lopez* court determined, however, it was not bound by Lopez's theory in examining the sufficiency of the evidence. The court first noted that a jury may make inconsistent findings or verdicts as to a defendant charged with two offenses. An acquittal on one offense will not invalidate a verdict on a second offense, although the two verdicts are factually inconsistent. (*People* v. *Lopez*, *supra*, 131 Cal.App.3d at p. 570.) This rule is based on the realization that inconsistent findings may be caused simply by the mercy or leniency of the jury. (*Id*. at p. 571.) The *Lopez* court found that this rule also should be applicable when the inconsistency exists between a verdict on an offense and a finding on an enhancement. It finally held the evidence was sufficient to support a jury verdict that defendant had fired a rile at a group of people and was guilty of assault with a deadly weapon. (*Id*. at pp. 570-572; see also *People* v. *Federico* (1981) 127 Cal.App.3d 20, 31-33 [179 Cal.Rptr. 315].)" (*People* v. *Nunez*, *supra*, 183 Cal.App.3d at p. 226.)

We agree with the conclusion reached by the *Nunez* and *Lopez* courts that a negative finding on a personal-use enhancement does not necessarily mean the accused was not a direct perpetrator of the crime. As pointed out in those cases, "inconsistent findings may be caused simply by the mercy or leniency of the jury" (*People* v. *Nunez*, *supra*, 183 Cal.App.3d at p. 226), to which we might add, or through confusion or ennui.

(6) It has been said that "[c]ollateral estoppel is an equitable concept based on fundamental principles of fairness. For issue preclusion purposes it means that a party ordinarily may not relitigate an issue that was fully and fairly litigated on a previous occasion." (*Sandoval* v. *Superior Court* (1983) 140 Cal.App.3d 932, 941 [190 Cal.Rptr. 29], cited in *People* v. *Nunez*, *supra*, 183 Cal.App.3d at p. 222.) Furthermore, "[c]ollateral estoppel is only applicable where the issue necessarily decided at the previous trial is identical to the one sought to be relitigated." (*People* v. *Taylor*, *supra*, 12 Cal.3d at p. 691, cited in *People* v. *Nunez*, *supra*, 183 Cal.App.3d at p. 222.)

(1c) Here, the issue which the People seek to relitigate is whether the defendant is guilty of murder and, if so, to what degree. We are not concerned with the subject of punishment following conviction. A use enhancement is relevant only to punishment. It is not an element of the substantive offense charged. When, as here, the defendant's earlier conviction of murder is reversed on appeal and the defendant is subject to retrial, a finding on an enhancement allegation by the first jury is superfluous to a determination of the guilt or innocence of the charged offense at the second trial.

Nor can it be said that the guilt issue was "fully" litigated at the first trial. There, the People were denied the testimony of Lowana Walker due to her invocation of the Fifth Amendment privilege. That testimony was, and is, significantly relevant to defendant's role in the homicide. The People's offer of proof demonstrated that evidentiary impediment would not be present on retrial.

The court in *People* v. *Nunez*, *supra*, 183 Cal.App.3d at page 223, referred to the observations of the United States Supreme Court on the subject of "'full and fair opportunity to litigate'" in *Standefer* v. *United States* (1980) 447 U.S. 10 [64 L.Ed.2d 689, 100 S.Ct. 1999]. While we acknowledge that the subject was discussed in the context of whether collateral estoppel barred the government from prosecuting the defendant as an aider and abettor when the alleged perpetrator had been acquitted of the underlying offense, we nevertheless find the discussion germane to the problem before us and quote, in part, from the *Nunez* analysis of *Standefer*.

". . . The court first noted that the government in a criminal case, unlike a party in a civil case, is often without the kind of 'full and fair opportunity to litigate' upon which collateral estoppel is based. . . . [¶] The *Standefer* court also reasoned that the rules of evidence could preclude the prosecution from presenting all the evidence it had in a particular case against a particular defendant. . . . The [*Standefer*] court stated, 'In such circumstances, where evidentiary rules prevent the Government from presenting all its proof in the first case, application of nonmutual estoppel would be plainly unwarranted.' (*Standefer* v. *United States*, *supra*, 447 U.S. at p. 24.)" (183 Cal.App.3d at pp. 223-224.)

None of the purposes justifying the application of collateral estoppel, as they have been defined by our Supreme Court in *People* v. *Taylor*, *supra*, 12 Cal.3d 686, find relevance in the case before us. Certainly, we cannot rely on a desire to promote judicial economy to justify collaterally estopping the retrial of defendant as a perpetrator when there is significant evidence pointing to his culpability in that regard. Certainly, there is no undermining of the integrity of the judicial system by inconsistent judgments when the only judgment in the case declared defendant guilty of first degree murder. More likely, the integrity of the system would be undermined by permitting enhancement findings, made irrelevant by reversal, to control the theory and evidence of the case on retrial. And certainly, it cannot be said that defendant is being subjected to harassment by vexatious litigation when he was subject to retrial for murder as an aider and abettor in any event.

As we noted earlier, "collateral estoppel is an equitable concept based on fundamental principles of fairness." Here, the People insist that the evidence points to the defendant as perpetrator, not aider and abettor, and decline to try the case solely on the latter theory. Based upon the offer of proof made to the trial judge at the motion hearing, their position does not appear unreasonable. If on retrial the prosecution were limited to trying the defendant as an aider and abettor, and a jury were to determine that Lowana did not personally shoot Karen Taylor, then defendant could be acquitted despite the existence of admissible evidence that he perpetrated the homicide. This flies in the face of fairness and good sense, particularly when a jury has already found sufficient evidence to convict the defendant of murder. The principles of fairness apply to all parties in the litigation. If the defendant were to enjoy an acquittal, then let it be on the merits following a fair presentation of admissible evidence and not because of an artificial curtailment of the People's theory and proof predicated upon a punishment finding which became irrelevant when the conviction was reversed.

Our dissenting colleague accuses us of "complete indifference to the double jeopardy clause of the Fifth Amendment." The rhetoric is unfortunate for it carries the implication that we are somehow involved with a double jeopardy issue in our consideration of whether defendant may be retried as a perpetrator. That is simply not the case. The defendant here is subject to "continuing jeopardy." The United States Supreme Court explains the concept of continuing jeopardy in *Justices of Boston Municipal Court* v. *Lydon* (1984) 466 U.S. 294, 308 [80 L.Ed.2d 311, 324-325, 104 S.Ct. 1805]:

(5b) "The Double Jeopardy Clause is not an absolute bar to successive trials. The general rule is that the Clause does not bar reprosecution of a defendant whose conviction is overturned on appeal. *United States* v. *Ball*, *supra*. The justification for this rule was explained in *United States* v. *Tateo*, 377 U.S. 463, 466 (1964), as follows: [¶] 'While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.'

"In *Price* v. *Georgia*, 398 U.S. 323, 329 (1970), we recognized that implicit in the *Ball* rule permitting retrial after reversal of a conviction is the concept of 'continuing jeopardy.' See also *Breed* v. *Jones*, 421 U.S. 519, 534 (1975). That principle 'has application where criminal proceedings against an accused have not run their full course.' 398 U.S. at 326. Interests supporting the continuing jeopardy principle involve fairness to society, lack of finality, and limited waiver. *Id.*, at 329, n. 4. . . ."

Succinctly stated, ". . . the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. [Citation.]" (*Richardson* v. *United States* (1984) 468 U.S. 317, 325 [82 L.Ed.2d 242, 251, 104 S.Ct. 3081].) Here, that event has not occurred and the original jeopardy continues.

(1d) Where neither double jeopardy nor the principle of collateral estoppel is applicable in preventing reprosecution, as is the case here, the parties are placed in the "same position as if the cause had never been tried." (*People* v. *Murphy* (1963) 59 Cal.2d 818, 833 [31 Cal.Rptr. 306, 382 P.2d 346], citing to *Hall* v. *Superior Court* (1955) 45 Cal.2d 377, 381 [289 P.2d 431].) The effect of a reversal of a judgment is discussed in *Odlum* v. *Duffy* (1950) 35 Cal.2d 562, 564-565 [219 P.2d 785]: "It is well settled that the reversal of a judgment or order ordinarily leaves the proceeding in the same situation in which it stood before the judgment or order was made. [Citations.] The same rule has been stated with respect to the reversal of orders in criminal cases. [Citation.] It therefore appears that upon the reversal of the trial court's order refusing to vacate the judgment of conviction, the parties were restored to the position that they had before the reversed order was made and with the same rights that they originally had, 'with the exception that the opinion of the court of appeal must be followed so far as applicable.'"

We must also take issue with our dissenting colleague's apparent reliance on *Arizona* v. *Rumsey* (1984) 467 U.S. 203 [81 L.Ed.2d 164, 104 S.Ct. 2305] and *Bullington* v. *Missouri*, *supra*, 451 U.S. 430, to justify the result reached in *Asbury* and *White* and which he would impose in the present case. (Dis. opn., *post*, at pp. 1341-1342.) In *Rumsey* and *Bullington* the Supreme Court did accord double jeopardy protection to special verdicts rendered by fact finders refusing to impose the death penalty. However, in both cases jeopardy was considered in light of detailed statutory procedures set in motion *after determination of guilt* and requiring a "precisely defined," separate presentence hearing on the issue of death or life imprisonment.[3]

What our dissenting colleague ignores in his discussion of *Rumsey* and *Bullington* is the acknowledged reluctance of the Supreme Court to extend the double jeopardy principle to sentencing and the very limited rational which supports the holding.

In *Bullington* the Supreme Court opened its discussion of the issue with the following comments: "It is well established that the Double Jeopardy Clause forbids the retrial of a defendant who has been *acquitted* of the crime charged. *United States* v. *DiFrancesco*, 449 U.S. 117, 129-130 (1980); *Burks* v. *United States*, 437 U.S. 1, 16 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977); *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962); *Green* v. *United States*, 355 U.S. 184 (1957). This Court, however, has resisted attempts to extend that principle to sentencing. The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed. The Court generally has concluded, therefore, that the Double Jeopardy Clause imposes no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside. See *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). See also *United States* v. *DiFrancesco*, 449 U.S., at 133, 137-138; *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 23-24 (1973); *Stroud* v. *United States*, 251 U.S. 15 (1919)." (*Bullington* v. *Missouri*, *supra*, at pp. 437-438 [68 L.Ed.2d at p. 278].)

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[3] Footnote 10 in *Bullington* notes: "At the statutorily prescribed presentence hearing, counsel make opening statements, testimony is taken, evidence is introduced, the jury is instructed, and final arguments are made. The jury deliberates and returns its formal punishment. . . ." (451 U.S. at pp. 438-439 [68 L.Ed.2d at p. 279].) In *Rumsey* the court, after outlining the procedure set forth in the Arizona statute commented: ". . . these characteristics make the Arizona capital sentencing proceeding indistinguishable for double jeopardy purposes from the capital sentencing proceeding in Missouri." (467 U.S. at p. 210 [81 L.Ed.2d at p. 171].)

The court continued: "The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner Bullington at his first trial, however, differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. . . . The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes." (451 U.S. at p. 438 [68 L.Ed.2d at pp. 278-279].)

The narrowly crafted holding in *Bullington* concludes: "Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial. We therefore refrain from extending the reasoning of *Stroud* v. *United States*, 251 U.S. 15 (1919), to this very different situation." (451 U.S. at p. 446 [68 L.Ed.2d at p. 284], fn. omitted.)

Clearly, *Bullington* and *Rumsey* are inapposite to *White* and the case before us. They involve cases where the defendants were *convicted of the crime charged* and the states' procedures required a second trial on the issue of punishment. However, our colleague's discussion of *Bullington* and *Rumsey* does serve to highlight the analytical error which permeates his dissent. He chooses to put the *Asbury*, *White* and Pettaway cases on the same plane, consistently ignoring that White and Pettaway were convicted of the first degree murder offense, while Asbury on the other hand, was impliedly acquitted of first degree felony murder. Thus while jeopardy had attached to Asbury, its protection did not flow to White or Pettaway.

There is another aspect of *People* v. *White*, *supra*, 185 Cal.App.3d 822, which requires discussion. In *White*, the respondent contended Penal Code section 954[4] permitted retrial of the gun use issue. Our colleagues in Division Five dismissed the argument on two grounds: "a statutory enactment cannot override the constitutional prohibition against double jeopardy" and "section 954 is concerned with multicount indictments or information, and not with the retrial of issues previously adjudicated to finality." (185 Cal.App.3d at p. 828.) The *White* court then explained that inconsistencies in unified jury verdicts are tolerated. To allow the prosecution to retry the case on the theory White used a firearm "'implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct . . . that lie at the heart of the double jeopardy clause.'" The court went on to say "the previous jury decided that issue and *acquitted* him of that *charge*." (*Id.* at p. 829, italics added.) The *White* court, we respectfully submit, was wrong in the application of section 954 and mischaracterized what the first jury did.

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[4] The relevant portion of section 954 provides: "An acquittal on one or more counts shall not be deemed an acquittal of any other count."

Both Pettaway and White were found by their first juries to be guilty of murder; both juries also found untrue the allegation of use of a firearm in connection with the murder. In *People* v. *Amick* (1942) 20 Cal.2d 247 [125 P.2d 25], appellant was charged in count one with manslaughter and in count two with negligent homicide. Both counts grew out of the same act by appellant. The jury found appellant guilty of negligent homicide and not guilty of manslaughter. Appellant claimed the verdicts were inconsistent and conflicting since the same evidence was relied on in both counts and the verdicts were insufficient to support the conviction. The Supreme Court held that the 1927 amendment to Penal Code section 954 permitted inconsistent verdicts and the disposition of one count had no bearing on the verdict with respect to other counts; each count must stand on its own merits.

In *People* v. *Federico*, *supra*, 127 Cal.App.3d 20, a jury determined appellant guilty of murder but also found untrue the enhancements that he was armed with a firearm and used a firearm. Appellant argued that reversal of the murder conviction was mandated because of fatal inconsistency between the verdict of guilty on the murder count and the jury's finding that the allegation that appellant was armed with a firearm in the commission of the murder was not true. The *Federico* court rejected this contention relying on Penal Code section 954 and the rule that each count must stand on its own merits. The court recognized a limited exception to the rule that each count must stand on its own merits. The exception comes into play where "'all of the essential elements of the crime of which the defendant was acquitted are identical to some or all of the essential elements of the crime of which he was convicted, *and proof of the crime of which the defendant was acquitted is necessary to sustain a conviction of the crime of which the defendant was found guilty*.'" (*Id*. at p. 32, italics in original.) While acknowledging that ". . . strictly speaking the allegation that defendant was armed in the commission of the murder did not charge a separate offense" the court held that ". . . the principles found in Penal Code section 954 and the cases interpreting it are applicable in resolving the logical inconsistency between the not true findings of the armed allegation and the guilty verdict on the murder charge." (*Id*. at pp. 32-33; see also *People* v. *Brown* (1985) 174 Cal.App.3d 762, 768 [220 Cal.Rptr. 264].)

Had Pettaway contended in his appeal that his conviction for murder must be reversed on the grounds it was inconsistent with the finding on the enhancement, he could not have prevailed under Penal Code section 954 and the above cited cases. There is no logical reason why the result should differ on retrial after his murder conviction was reversed for *Beeman* error. The finding on the enhancement simply has no effect on the murder charge in the first or the second trial.

(7) Finally, we briefly address whether under double jeopardy principles defendant here may be retried on the enhancement allegations which the jury determined in his favor. Earlier we noted that the People had conceded defendant's immunity from retrial on the enhancement issues. Subsequent to our submission of this matter we requested additional briefing addressed to the propriety of this concession. We are now satisfied that the People's concession was sound and that retrial on an enhancement allegation is precluded where a jury has resolved that question, correctly or not, in defendant's favor.

The California Supreme Court addressed the issue in *People* v. *Henderson* (1963) 60 Cal.2d 482, 495-497 [35 Cal.Rptr. 77, 386 P.2d 677]. Justice Traynor, writing for the majority, stated: "Defendant contends that the prohibition against double jeopardy precludes imposing the death sentence after reversal of the first judgment sentencing him to life imprisonment. Article I, section 13, of the California Constitution provides that 'No person shall be twice put in jeopardy for the same offense. . . .' It states a fundamental principle limiting the state's right repeatedly to prosecute a defendant. It is not an absolute prohibition, for although jeopardy may have attached, legal necessity or the real or implied consent of the defendant permits a retrial. [Citation.] In the present case, we must determine the extent to which a defendant who attacks an erroneous conviction thereby opens the door to being again placed in jeopardy. [¶] He does not gain immunity, for by successfully attacking the judgment he at least subjects himself to a retrial that may reach the same result. [Citations.] There is a sharp conflict in the cases, however, whether such an attack opens the door to the imposition of a more severe sentence on retrial. . . ."

Concluding that the double jeopardy principle of the state Constitution forbids the imposition of a greater punishment for the same crime on retrial, Justice Traynor concluded: "A defendant's right of appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal." (*People* v. *Henderson*, *supra*, 60 Cal.2d at p. 497.)

More recently our Supreme Court in *People v. Collins* (1978) 21 Cal.3d 208, 216 [145 Cal.Rptr. 686, 577 P.2d 1026], addressing a sentencing issue observed: "We find precedent for the foregoing result in a line of cases based on principles of double jeopardy. Our concern there was specifically to preclude vindictiveness and more generally to avoid penalizing a defendant for pursuing a successful appeal. In *People v. Ali* (1967) 66 Cal.2d 277, 281 [57 Cal.Rptr. 348, 424 P.2d 932], we stated that 'a defendant should not be required to risk being given greater punishment on a retrial for the privilege of exercising his right to appeal.'"

For the reasons expressed in *Henderson* and *Collins*, we agree that defendant cannot be retried on the Penal Code sections 12022.5 and 12022.7 enhancements.

The judgment of dismissal is reversed. The case is remanded for trial in accordance with the views expressed herein.

Rouse, J.,* concurred.

KLINE, P.J., Concurring and Dissenting--I concur in the majority's conclusion that defendant may not be retried on the enhancement allegations that the jury decided in his favor. I dissent from the rest of the opinion, which, with complete indifference to the double jeopardy clause of the Fifth Amendment, concludes that defendant may be retried as the actual perpetrator in the killing of Karen Taylor despite a not true finding on the gun-use allegation at his first trial.

The jury's determination that defendant was not the trigger man seems as inexplicable to me as it does to my colleagues. The perceived incorrectness of a jury verdict in favor of a criminal defendant does not, however, create a license for appellate courts to right the wrong at all costs. The theory my colleagues contrive to avoid the consequences of the jury's explicit factual finding is not supported by the cases they rely upon, is analytically unsound and unjust and creates a constitutional problem that will prove far more troublesome than the questionable jury determination in this case.

In *People v. White* (1986) 185 Cal.App.3d 822 [231 Cal.Rptr. 569] another division of this court unanimously held that an accused may not be retried as the actual perpetrator after a prior jury has indicated, by way of its not true findings on gun use allegations, that he did not fire the fatal shots.

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The majority rejects *White* and reaches a contrary conclusion based on (1) its belief that the court in *White* failed to take into account relevant case law and improperly relied on *People v. Asbury* (1985) 173 Cal.App.3d 362 [218 Cal.Rptr. 902], which my colleagues think distinguishable; (2) the theory that the jury's rejection of the gun use allegation is not legally equivalent to a determination that the accused did not personally commit the homicide because it relates solely to sentencing; and (3) the claim that the procedural requirements for the invocation of collateral estoppel have not been met since the gun use finding was not "essential" to the first conviction and the prosecution was denied an opportunity to "fully and fairly" litigate the issue of defendant's gun use during the first trial. I will discuss each of these points in turn.

1.

In *White* the defendant appealed from a conviction of two counts of first degree murder. He maintained the trial court erred in permitting the prosecution to try the case on the theory that he personally shot the victims after the jury in a previous trial had determined he had not used a firearm in connection with the killings. The court agreed and reversed the judgment.

The majority strains to discredit *White* by questioning the relevance of *People v. Asbury, supra,* upon which *White* relies. In *Asbury* the jury at the first trial found the defendant guilty of first degree murder and robbery but rejected the special circumstances that the murder had occurred in the course of robbery. The Court of Appeal held that the subsequent felony-murder conviction was barred by the doctrine of collateral estoppel--which is included within the Fifth Amendment's guaranty against double jeopardy (*Ashe v. Swenson* (1970) 397 U.S. 436, 443 [25 L.Ed.2d 469, 475, 90 S.Ct. 1189])--because "the original jury, in finding the special circumstance not true, necessarily rejected the notion that the murder occurred during the course of robbery." (*People v. Asbury, supra,* 173 Cal.App.3d at p. 365.) The majority claims that *Asbury* is inapposite because, despite the court's clear statement to the contrary, the case did not genuinely raise an issue of collateral estoppel. According to the majority, the finding of the first *Asbury* jury that the murder had not occurred during the commission of the robbery "*impliedly acquitted Asbury of the offense of first degree murder . . . in the perpetration of a robbery.*" (Maj. opn., *ante,* p. 1320, original italics.) Relying upon language in Penal Code section 1023, a statute never mentioned in the *Asbury* opinion, the majority concludes that "felony murder was an offense 'of which [*Asbury*] might have been convicted under the accusatory pleading' at the first trial." (*Ibid.*) My colleagues' rationale for the result in *Asbury* does not hold up to analysis.

As our Supreme Court has pointed out, Penal Code section 1023 relates to the doctrine of included offenses, which is a part of the constitutional guaranty against double jeopardy. (*People v. Kehoe* (1949) 33 Cal.2d 711, 713 [204 P.2d 321], cert den. *Kehoe v. California* (1949) 338 U.S. 834 [94 L.Ed. 509, 70 S.Ct.

39].) The statute provides as follows: "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading." This language does not apply to the situation that existed in *Asbury*.

First of all, felony murder is not an offense "necessarily included" within the offense of first degree murder; indeed, what the majority refers to as the "offense" of "first degree felony murder" (maj. opn., *ante*, p. 132) does not exist; felony-murder is merely one of several definitions of murder in the first degree. (Pen. Code, § 189.) Ordinarily, a jury is not required to determine whether a defendant charged with first degree murder committed the offense in the course of committing any of the felonies enumerated in Penal Code section 189 *unless* the People prosecute the case on such a theory, in which case the jury receives CALJIC No. 8.21, which instructs that "[t]he unlawful killing of a human being . . . as a result of the commission of [a specified felony] . . . is murder of the first degree." Because a felony-murder theory was not originally advanced in *Asbury* this instruction was not given. The factual question whether the homicide was committed in the course of another felony was presented to the jury only because of the special circumstances allegation. If, contrary to the doctrine of included offenses set forth in Penal Code section 1023, conviction of first degree murder can result in an "implied acquittal" of that same offense on a prosecution theory which, though it was not actually advanced, can be shown to have been rejected by the jury due to a finding made in connection with a penalty enhancement, then the defendants in *White* and this case were also impliedly acquitted of first degree murder on the theory that they directly committed the act constituting the offense and were therefore perpetrators within the meaning of the Penal Code. (Pen. Code, § 31.) For purposes of the theory of implied acquittal conjured by the majority, the facts of *Asbury*, *White* and the present case are materially indistinguishable.

Moreover, if the majority's novel theory were accepted, the instant case would present an even stronger case than *Asbury* for implied acquittal. As indicated, the prosecution did not initially advance a felony-murder theory in *Asbury* and the jury addressed the factual question only because of allegations made in order to enhance penalty. In this case, on the other hand, the prosecution did advance an aiding and abetting theory that necessitated the giving of instructions (CALJIC Nos. 3.00 and 3.01) describing the difference between a perpetrator and an aider and abettor in connection with the charged homicide. Therefore, while the *Asbury* jury almost certainly did not understand the relationship between the facts set forth in the enhancement allegation and those relating to the murder charge (because it was never told about the felony-murder rule), the jury in this case almost certainly did understand that relationship, making it easier here to imply acquittal on the theory defendant directly committed the homicide than it was in *Asbury* to imply acquittal on a felony-murder theory.

Looking at it from the point of view of the majority's distorted notion of the doctrine of included offenses, the prosecution's theory that the defendant in this case directly committed the homicide was much more clearly "included" in the charges against him than was felony-murder "included" in the charges against *Asbury*.

Though the majority's concept of included offenses and the collateral theory of implied acquittal, if consistently applied, would justify the result in this case that I think is constitutionally compelled, the majority's analysis is fundamentally flawed. The theory of implied acquittal embraced in Penal Code section 1023 is correctly applied only in relation to a charged or necessarily included offense; it therefore has no application either in *Asbury* or in this case.

Asbury was correctly decided for the reason stated in that opinion--collateral estoppel, not because of an implied acquittal. The situation in that case, like the situation in *White* and that here, satisfied all three requirements of collateral estoppel. The party against whom the estoppel was asserted was a party at the earlier trial, that proceeding resulted in a final judgment on the merits with respect to the ultimate fact in issue,[1] and,

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1. Rejection of the special circumstances allegation in *Asbury*, like the findings of no gun use in *White* and the present case, could not have been appealed and therefore constituted a judgment which, for purposes of collateral estoppel, was both valid and final. As has authoritatively been stated, "[f]or purposes of issue preclusion . . . . 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." (Rest.2d Judgments, § 13.) "To be 'final' for purposes of collateral estoppel the decision need only be immune, as a practical matter, to reversal or amendment." (*Miller Brewing Co.*

most important for present purposes, the issue necessarily decided at the previous trial was identical to the one sought to be relitigated. The *Asbury* court found that when the first jury refused to find that the defendant committed the murder "in the commission of" the robbery (the phrase used in the special circumstance instruction), it was effectively declaring that he did not commit the murder "as a result of" the robbery (the language of the felony-murder instruction). The court was in effect saying that the finding of the jury at the previous trial was not simply an evidentiary determination but an "ultimate fact" (i.e., a finding involving the application of law to fact) with respect to both the special circumstances allegation and the question of felony murder. *Asbury* was thus a classic case for application of the rule of collateral estoppel because, as the Supreme Court has stated, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (*Ashe v. Swenson, supra,* 397 U.S. 443 [25 L.Ed.2d at p. 475]; *People v. Taylor* (1974) 12 Cal.3d 686, 693 [117 Cal.Rptr. 70, 527 P.2d 622]; Rest.2d Judgments, § 27.)

Similarly, when the jury in the present case rejected the allegation that Pettaway "personally used a firearm during the commission of [the alleged homicide]" (the phrase used in the gun use instruction, CALJIC No. 17.19), it was effectively declaring that he did not "directly

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v. Jos. Schlitz Brewing Co. (7th Cir. 1979) 605 F.2d 990, 996, cert. den., 444 U.S. 1102 [62 L.Ed.2d 787, 100 S.Ct. 1067]; see *Lummus Company v. Commonwealth Oil Refining Company* (2d Cir. 1961) 297 F.2d 80, 89, cert. den., 368 U.S. 986 [7 L.Ed.2d 524, 82 S.Ct. 601].)

and actively commit the act constituting the crimes" (the language of CALJIC No. 3.00, given as part of the aiding and abetting instruction), thereby negating an ultimate fact necessary to convict him on the ground that he actually perpetrated the homicide. Jeopardy therefore attached in this case in precisely the same manner it did in *Asbury*. Just as Asbury might have been convicted on a felony-murder theory under the accusatory pleading at the first trial, so too at his first trial might Pettaway have been convicted of murder as a perpetrator, as the district attorney vigorously urged.

The special circumstances allegation in *Asbury,* like the gun-use allegation in *White* and in this case, was not included in the charges in order to establish an element of any offense, but simply to enhance the penalty. (Pen. Code, § 190.2.) The *Asbury* court recognized, however, that this was not crucial. With "realism and rationality," the court simply inquired "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration" (*Ashe v. Swenson, supra,* 397 U.S. 436, 444 [25 L.Ed.2d at pp. 475-476], fn. omitted) and found that it could not. This is what we should do, rather than employ "the hypertechnical and archaic approach of a 19th century pleading book." (*Ibid.* [25 L.Ed.2d at p. 475].)

In a later part of its opinion the majority also takes issue with the *White* court's refusal to accept the argument that Penal Code section 954 (which, as pertinent, provides that "An acquittal on one or more counts shall not be deemed an acquittal of any other count") permitted retrial of the gun use issue. (Maj. opn, *ante,* p. 1329.) The majority's point is summed up in the following three sentences: "Had Pettaway contended in his [initial] appeal that his conviction for murder must be reversed on the grounds it was inconsistent with the finding on the enhancement, he could not have prevailed under section 954 and [*People v. Amick* (1942) 20 Cal.2d 247 [125 P.2d 25] and *People v. Federico* (1981) 127 Cal.App.3d 20 [179 Cal.Rptr. 315]]. There is no logical reason why the result should differ on retrial after his murder conviction was reversed for *Beeman* error. The finding on the enhancement simply has no effect on the murder charge in the first or the second trial." (Maj. opn., *ante*, p. 1330.)

This reasoning reveals the majority's failure to understand the difference between an inconsistent verdict at a single trial and multiple trials of the same person for the same offense. In *People v. Tideman* (1962) 57 Cal.2d 574 [21 Cal.Rptr. 207, 370 P.2d 1007], the Supreme Court described the statutory history of 954, stating that the legislative purpose of the language here relevant was to make it "altogether clear that under current criminal procedure . . . '[t]he doctrine of double jeopardy has no application [in a single criminal action] to a defendant who is tried but once on several counts. [Fn. omitted.]'" (*Id.*, at p. 581, quoting *People v. Chessman* (1951) 38 Cal.2d 166, 193 [238 P.2d 1001], cert den. *Chessman v. California* (1952) 343 U.S. 915 [96 L.Ed. 1330, 72 S.Ct. 650].) The reasons the law tolerates inconsistent verdicts, which were set forth in *White*,[2] are entirely unrelated to the fundamentally different considerations that come into play when an accused person is subjected to more than one trial for the same offense.

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[2] The *White* opinion includes the following quote from *United States v. Mespoulede* (2d Cir. 1979) 597 F.2d 329, 336-337: "'We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our

My colleagues say they can think of no "logical reason" why the rationale of Penal Code section 954 should not apply where an individual is subjected to a second trial for the same offense. The "logical reason" they cannot fathom is the very principle that informs the prohibition against double jeopardy. "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with

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jurisprudence. There is no question but that a jury in a criminal trial has the power to render a verdict of acquittal that is wholly at odds with the law and the facts. As we pointed out in *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960), this notion has its roots in the fact that the jury was originally conceived of as "inscrutable." Although we no longer believe that a jury's pronouncements must be accepted as unquestioningly as the results of an ordeal by cold water or an oath of compurgation, see T. Plunkett, A Concise History of the Common Law 115-16 (5th ed. 1956), an "arbitral" element of jury decision-making survives. We recognize that the jury is in a sense the conscience of the community and can, for example, render a verdict to mitigate an overly severe punishment. *United States v. Maybury, supra*, 274 F.2d at 902. Similarly, in compromising in order to reach a unanimous verdict, a jury is often fulfilling its role as a cross-section of the community that it is supposed to represent. Occasional anomalies are the price of unanimity. *Id.*, at 903. [¶] Internal inconsistency, then, is not an end in itself, and it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results. Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause.' (Fn. omitted.)" (*People v. White, supra*, 185 Cal.App.3d at pp. 828-829.)

all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (*Green v. United States* (1957) 355 U.S. 184, 187-188 [2 L.Ed.2d 199, 204, 78 S.Ct. 221, 61 A.L.R.2d 1119].) This ancient idea, whose origins can be traced to Greek and Roman times and which became established in the common law of England long before our Nation declared its independence (*Benton v. Maryland* (1969) 395 U.S. 784, 795 [23 L.Ed.2d 707, 716, 89 S.Ct. 2056]), is too firmly rooted in our criminal jurisprudence to permit question. As Chief Justice Burger once observed, "where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, *based on grounds which are not open to judicial examination.*" (*Burks v. United States* (1978) 437 U.S. 1, 11, fn. 6 [57 L.Ed.2d 1, 9, 98 S.Ct. 2141], italics added.)

The *White* court was indubitably correct in concluding that the prohibition of double jeopardy cannot be compromised by application of Penal Code section 954 or its rationale.

Having cavalierly disposed of *White*, the majority relies on *People v. Lopez* (1982) 131 Cal.App.3d 565 [182 Cal.Rptr. 563] and *People v. Nunez* (1986) 183 Cal.App.3d 214 [228 Cal.Rptr. 64] (rev. den. Oct. 16, 1986) as support for its position. In *Lopez*, the defendant was found guilty on six counts of assault with a deadly weapon but the jury found he did not personally use a firearm. On appeal he claimed there was insufficient evidence to support the verdict and asserted that in light of the jury's findings on the use allegation the court was bound to assume he was convicted as an aider and abettor and not a principal. The court found the case analogous to those involving inconsistent verdicts[3] and rejected the defendant's argument, finding that the inconsistency between the verdict on each of the offenses and the finding on the enhancement did not invalidate the convictions. *Lopez* is obviously different from the instant case, which does not involve rationally inconsistent verdicts or findings.[4] More importantly, since Lopez had been tried only once his case has nothing to do with the principles of collateral estoppel and double jeopardy that are directly implicated in this case, where defendant appears destined to face retrial for the same offense on a factual theory explicitly rejected by a prior jury.

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[3] Penal Code section 954, which applies to this situation, provides that "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . . An acquittal of one or more counts shall not be deemed an acquittal of any other count." The Court concluded that pursuant to this language, a verdict is valid "'even though the jury's action in returning it was, in a legal sense, inconsistent with its action in returning another verdict of acquittal or guilt of a different offense.'" (*Lopez, supra,* 131 Cal.App.3d at p. 570, quoting Witkin, Cal. Criminal Procedure, § 549, p. 560.)

[4] There is, of course, nothing illogical about finding appellant guilty of murder as an aider and abettor if, as must be presumed to have been the case, the jury was not convinced he used a gun during the crime.

My colleagues' reliance upon *Lopez* is curious, because the opinion in that case does not support but repudiates their principal assertion that a factual finding on an alleged enhancement is for double jeopardy purposes significantly different from a factual determination relating to an element of an offense. When it commenced its inquiry into the legal effect of the inconsistency between the verdict on each of the offenses and the finding that he did not use a firearm, the court in *Lopez* considered whether to ignore the finding of no use on the ground that, technically, an enhancement may be differentiated from an element of the offense--which is the course my colleagues take. The court refused to take this position because it realized that for the purposes of its legal analysis a negative factual finding regarding an enhancement cannot rationally be distinguished from a factual finding regarding an element of an offense. As stated in *Lopez*, "although the amended information alleges 'enhancement' rather than an 'offense' . . . , the degree of factual inconsistency is no greater, or no less, than in the cases discussed above [in which the inconsistency was solely between offenses]." (*Lopez, supra,* 131 Cal.App.3d at p. 570.)

The majority also relies on *People v. Nunez*, *supra*, 183 Cal.App.3d 214, where the defendant was convicted of conspiracy to commit murder for financial gain and first degree murder, although the jury found he did not personally use a firearm. Nunez maintained that since the jury had returned a not true finding on the gun-use allegation he had been convicted as an aider and abettor and, therefore, should benefit from the juries' conclusions in his coconspirators' cases that the killing was not committed with malice for financial gain.[5] The court properly rejected these claims. First, it found that Nunez's motive for participating in the killing was not necessarily derived from his coconspirator and that he could be convicted of killing for financial gain despite the contrary finding at the trial of one of his coconspirators.

The court further reasoned that the verdict in the trial of Nunez's coconspirator, Medina, did not necessarily establish that Medina had been convicted as the perpetrator or that the jury had determined he had acted without malice. Because the record was insufficient to determine whether Medina had been tried solely as the perpetrator the court concluded that the requirements for applying collateral estoppel had not been met: "we cannot say the previous jury necessarily determined the only principal between the two men did not harbor malice. This issue not being decided adversely to the prosecution, collateral estoppel would not bar defendant's conviction of the crime of murder on the theory that he was either the direct perpetrator or guilty as an aider and abettor." (*Nunez, supra,* 183 Cal.App.3d at p. 227.) Thus, the court relied heavily on "the difficulty of identifying the issues resolved against the People in the prior trial." (*Id.,* at p. 221, relying on *People v. Taylor* (1974) 12 Cal.3d 686, 696 [117 Cal.Rptr. 70, 527 P.2d 622].) There is no such difficulty in the present case, where we know exactly what issue was resolved against the People at the first trial.

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[5] Nunez theorized that if he participated only as an aider and abettor he must have shared the principal's intent--which a prior jury determined was something less than malice (since Nunez's coconspirator was convicted of manslaughter, not murder). Similarly, since another jury had concluded that Nunez's other coconspirator had not committed the killing for financial gain, Nunez argued that he also could not have committed the crime for that purpose.

I have no quarrel with the reasoning in *Nunez*. However, in reaching its conclusion the court considered the effect of a negative finding on a gun-use allegation and made the bewildering statement--seized upon by the majority here--that "[a] jury's finding on an alleged enhancement that an accused was not armed with a firearm or did not personally use a firearm does not necessarily mean that the accused was not a direct perpetrator of the crime." (*People v. Nunez, supra,* 183 Cal.App.3d at pp. 225-226.) Taken out of context, this statement is irrational. A jury which finds that a defendant did not personally use a handgun in a case in which the victim died from gunshot wounds is clearly stating its belief that the defendant was not the perpetrator.

This is not what the *Nunez* court either needed or could have meant to say. The statement appears in *Nunez* in the context of a discussion of *People v. Lopez, supra,* 131 Cal.App.3d 565, in which, as I have described, the court held that inconsistencies between a verdict on an offense and a finding on an enhancement did not invalidate the verdict on the offense. Therefore, the idea the *Nunez* court almost certainly intended to convey by the statement in question is that a jury's finding on an alleged enhancement that an accused did not personally use a firearm does not necessarily mean that the accused could not be *convicted* as a perpetrator *pursuant to an inconsistent verdict on the offense in the same case.*

It also bears pointing out that the *Nunez* court accepted the conclusion in *Lopez* that an inconsistent jury finding cannot be ignored simply because it relates to an enhancement rather than an offense. (*Nunez, supra,* 183 Cal.App.3d at p. 226.) Thus, to the dubious extent that *Nunez* and *Lopez*, which did not involve multiple trials of the same person for the same offense, are at all germane to the issues before us here, they reject rather than support the basic idea upon which my colleagues construct their house of cards.

2.

The second theory advanced by the majority attempts to distinguish the jury's negative finding on the gun use allegation from a determination that the accused was not the actual killer. The majority argues that the jury's finding on the gun-use allegation ought not preclude appellant's retrial as the actual perpetrator because "[w]e are not concerned with the subject of punishment following conviction. A use enhancement is relevant only to punishment." (Maj. opn., *ante,* p. 1325.) To be sure, an *affirmative* personal use finding would technically affect only the length of sentence, and not the issue of guilt on the substantive offense (though the jury is unaware of the limited effect of its determination). However, we do not have an affirmative gun-use finding, but a *negative* finding, which has implications that go beyond sentencing. As I have been insisting, the plain and unassailable reality is that when in a murder case the jury determines that a gun-use allegation is untrue it is unmistakably declaring that the defendant was not the perpetrator of the homicide. That this factual determination addresses an allegation pled separately from the offense is not only unknown to the jury but wholly beside the legal point. As earlier explained, the negative finding on the gun use relates to an issue of "ultimate fact." Once such an issue has been validly determined in favor of a defendant, as it has in this case, it cannot be litigated between the same parties in any future lawsuit. (*Ashe v. Swenson, supra,* 397 U.S. 436, 443 [25 L.Ed.2d 469, 475].)

The principle that the People are precluded from relitigating the same issue against the same defendant based on the same factual circumstances may apply even if the original determination was sought in connection with the issue of penalty, did not formally result in an acquittal on a charged offense, and did not necessarily negate the possibility of prosecution for an independent offense. When in *Arizona v. Rumsey* (1984) 467 U.S. 203 [81 L.Ed.2d 164, 104 S.Ct. 2305] and *Bullington v. Missouri* (1981) 451 U.S. 430 [68 L.Ed.2d 270, 101 S.Ct. 1852], the United States Supreme Court accorded double jeopardy protection to special verdicts rendered by fact finders refusing to impose the death penalty, it reasoned that the verdicts were essentially indistinguishable from acquittals on charged offenses because (1) the prosecution had the burden of proving statutorily defined facts beyond a reasonable doubt; (2) the court or jury was required to make specific findings or render a special verdict; (3) the factfinder's decision was based on a determination that the prosecution either had or had not proved its case; and (4) the determination was made following a hearing which involved the submission of evidence and presentation of argument. (*Arizona v. Rumsey, supra,* 467 U.S. at pp. 209-211 [81 L.Ed.2d at pp. 170-171]; *Bullington v. Missouri, supra,* 451 U.S. at p. 438 [68 L.Ed.2d at pp. 278-279].) All of these requirements were met in the present case with respect to the gun-use allegation. Thus, the fact that the allegation related, inter alia, to sentencing does not in and of itself permit the substance of the allegation to be relitigated.

My colleagues take me to task for allegedly ignoring the reluctance of the Supreme Court in *Rumsey* and *Bullington* to extend the double jeopardy principle to sentencing and the limited rationale which supports the holdings in those cases. (Maj. opn., *ante*, p. 1328.) The judicial reluctance to which my colleagues refer clearly does not relate to the type of situation presented in this case. *Rumsey* and *Bullington* both involved capital murder charges under state laws that separated trial on the issue of guilt from that on the issue of penalty. In both the triers of fact found against the defendant on the question of guilt but, at the sentencing trial, found that the penalty of death should not be imposed. It was the latter findings that barred the state from seeking to reimpose the death penalty at a second trial. The *Bullington* court noted that the principle of double jeopardy ordinarily does not apply to sentencing because "[t]he imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed." (*Bullington v. Missouri, supra,* 451 U.S. at p. 438 [68 L.Ed.2d at p. 278].) Double jeopardy was nevertheless applied in *Bullington* and *Rumsey* because in those cases the prosecution had the burden of proving certain facts beyond a reasonable doubt and the sentencing hearing "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence." (*Ibid.* [68 L.Ed.2d at p. 279], *Arizona v. Rumsey, supra,* 467 U.S. at pp. 209-210 [81 L.Ed.2d at pp. 170-171].) The doubts expressed by the Supreme Court about the application of double jeopardy principles to matters that ordinarily relate only to sentencing certainly do not apply to the situation presented in this case, where the critical fact was established at a proceeding that did not merely resemble but *was* the trial on the issue of guilt or innocence.

The majority's suggestion that, out of mercy or a desire for leniency, the jury might have issued a negative finding on the gun use even if it really believed appellant was the trigger man is not only inconceivable as a matter of fact but highly irregular as a matter of law. The notion that the jury may have acted out of mercy or a desire for leniency is not based upon anything in the record, but was presumably suggested by judicial reliance on such a possibility in cases like *People v. Nunez, supra,* 183 Cal.App.3d at p. 226, involving inconsistent verdicts at a single prosecution. (E.g., *Dunn v. United States* (1932) 284 U.S. 390, 393 [76 L.Ed. 356, 359, 52 S.Ct. 189, 80 A.L.R. 161], quoting *Steckler v. United States* (2d Cir. 1925) 7 F.2d 59, 60; *People v. Amick, supra,* 20 Cal.2d 247, 252, quoting *People v. Horowitz* (1933) 131 Cal.App.Supp. 791, 793-794 [19 P.2d 874]; see also *Standefer v. United States* (1980) 447 U.S. 10, 11 [64 L.Ed.2d 689, 692-693, 100 S.Ct. 1999].) I am aware of no authority for the proposition that a person may be twice prosecuted for the same offense because an ultimate fact decided adversely to the People in the first trial may have resulted from undeserved mercy or a desire for leniency.

Absent specific and strong reason to think otherwise, an appellate court is required to assume that a jury verdict in a case under review resulted from a proper understanding and application of the trial court's instructions (*Zuckerman v. Underwriters at Lloyd's* (1954) 42 Cal.2d 460, 478-479 [267 P.2d 777]; *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 536 [238 Cal.Rptr. 363]; *Trapani v. Holzer* (1958) 158 Cal.App.2d 1, 6 [321 P.2d 803]), which in a criminal case includes the admonition that the subject of punishment is not to be discussed or considered by the jury and must not in any way affect its verdict. (CALJIC No. 17.42.) We must presume that the jurors were intelligent persons who understood and followed the instructions they received. (*People v. Romo* (1975) 47 Cal.App.3d 976, 990 [121 Cal.Rptr. 684]; *People v. Powell* (1960) 186 Cal.App.2d 54, 59 [8 Cal.Rptr. 707].) If reviewing courts are permitted to attribute an unapparent but congenial meaning to a jury verdict with which they otherwise do not agree, they will have freed themselves from the constraints of neutral legal principles and made a mockery of the appellate process.

The record presents absolutely no reason to believe that, as the majority wildly speculates, the jury rejected the gun use allegation out of mercy or "through confusion or ennui." (Maj. opn., *ante*, p. 1324.) On the contrary, what evidence we do have of the jury's motives indicates exactly the opposite of that which my colleagues conveniently imagine. As the majority acknowledges, on the third day of deliberations the jury conveyed a note to the court stating: "please explain the law concerning complicity, for example, in this case *may the defendant be convicted of murder or attempted murder without having personally fired the bullets?*" (Maj. opn., *ante*, p. 1315, italics added.) Shortly after receiving the requested aiding and abetting instructions the jury returned verdicts of guilty for both first degree murder and attempted murder.

Significantly, the jury found the gun-use allegations true as to the attempted murder but untrue as to the murder. The nature of the legal question the jury put to the judge shortly before it returned its verdict and the different findings on the two gun-use allegations plainly show the jury was discriminating in its evaluation of the evidence and that it did not believe defendant pulled the trigger of the gun that killed Karen Taylor.

The record shows not only that the jury knew what it was doing and meant what it said but that the district attorney who prosecuted the case actually anticipated this result.

It was defense counsel--clearly fearful of a compromise verdict--who objected to the giving of aiding and abetting instructions at the close of trial. When the jury later requested such instructions the district attorney urged that they be given and stated that his failure to earlier insist that this be done was inadvertent. The prosecutor's rationale for giving the aiding and abetting instructions was as follows: "What I neglected to bring to the Court's attention and to the jury's attention is because the defense in this case was that the defendant did not commit either offense, that if the jury in fact rejected the defense's version of what happened and accepted the prosecution's version, *and the evidence I think was much stronger on the attempted murder as point out to the defendant [sic] than on the murder charge,* that if the jury did in fact accept the defendant as being the principal on the attempted murder, and having rejected anyone else's presence, then only two people could have been involved in the murder: The defendant or Ms. Lawanna Walker. *And the jury could still convict the defendant of murder, if* *they believed Lawanna Walker had in fact fired the fatal shots* . . . ." (Italics added.)

The result foreseen by the district attorney is the result that came to pass. He must now live with it, because, as apparently still needs to be said, the constitutions of this state and nation forbid placing a person twice in jeopardy for the same criminal act. (Cal. Const., art. I, § 15; U.S. Const., 5th Amend.)

3.

Finally, the majority claims collateral estoppel cannot be applied in this case since (1) the gun-use finding was not "essential" to the judgment; and (2) the prosecution was not permitted to fully litigate the question of appellant's actions at the first trial due to Ms. Walker's refusal to testify.

The majority focuses on language from *Newton v. Superior* Court (9th Cir. 1986) 803 F.2d 1051, 1057, cert. den. (1987) 481 U.S. 1070 [95 L.Ed.2d 873, 107 S.Ct. 2464], which indicates that collateral estoppel will only apply to those issues that were actually litigated and "'essential to the judgment'" and argues that collateral estoppel should not apply in this case because the use finding is "adjunctive" in nature. This is casuistry. The principle that collateral estoppel only applies to issues essential to the judgment ensures that parties are precluded from relitigating only those issues actually decided by the trier of fact. In the absence of special findings, a later court may know that a subsidiary issue was resolved only if it was "essential to the judgment." It is elementary, however, that inquiry whether a particular issue was essential to an earlier judgment is necessary only if that judgment does not explicitly address the issue or the question is otherwise in doubt. Such inquiry is obviously unnecessary where, as in this case, there can be no doubt either that the original finder of fact specifically addressed and decided the issue in question (because it did so in a special verdict) or that the finding was essential (because, as required by law, the court directed that the finding be made and included it in the judgment). Nor can there by any doubt that the issue originally decided--whether appellant pulled the trigger of the gun that killed Karen Taylor--is the precise issue that would be presented again at the second trial. As pointed out in the Restatement, "[w]hen an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of the [rule of collateral estoppel]." (Rest.2d Judgments, *supra,* § 27(d), p. 255.)

It bears mentioning, in this connection, that double jeopardy protection is regularly accorded criminal defendants in instances in which the jury was much less explicit than the jury here. Under the theory of implied acquittal codified in Penal Code section 1023, "a verdict of guilty of a lesser included offense constitutes an implied acquittal of the greater offense of which the jury could have convicted the defendant." (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 511 [183 Cal.Rptr. 647, 646 P.2d 809], fn. omitted; *Green v. Superior Court, supra,* 355 U.S. 184.) Further, "[i]n some circumstances, double jeopardy bars a retrial even though no verdict has been rendered. Once jeopardy attached, discharge of the jury without a verdict is tantamount to an acquittal and prevents a retrial, unless the defendant consented to the discharge or legal necessity required it. [Citations.]" (*Stone, supra,* at

p. 516.) It seems to me anomalous to grant double jeopardy protection where a jury has not resolved an issue at all, or done so only by implication, but to deny protection where, as in this case, the jury has explicitly ruled in favor of the defendant regarding an ultimate fact.

Perhaps the most astonishing aspect of the majority opinion is the notion that collateral estoppel should not be applied in this case because the prosecution did not at the first trial have a full and fair opportunity to litigate the issue of defendant's guilt. (Maj. opn., *ante*, pp. 1325-1326.) The majority bases this theory on the analysis employed by the United States Supreme Court in *Standefer v. United States, supra,* 447 U.S. 10, an opinion which has almost nothing to do with the issue before us here. In *Standefer* the defendant was indicted, inter alia, for aiding and abetting a named Internal Revenue Service agent in accepting unlawful compensation. Prior to the indictment, the IRS agent was acquitted of certain of the violations the defendant was accused of aiding and abetting. The defendant thereupon moved to dismiss his indictment as to these violations on the ground that since the agent had been acquitted of such violations, the defendant could not be convicted of aiding and abetting them. In other words, unlike the present case, the defendant in *Standefer* was not subject to retrial; there was no prior jury finding that he could not have committed the offense in the manner charged.

In affirming the trial court's denial of the motion to dismiss, the Supreme Court expounded at some length upon the doctrine of nonmutual collateral estoppel in the context of a criminal case. In explaining that the prosecution is often without the kind of "'full and fair opportunity to litigate'" that is a prerequisite of estoppel, the court specified the aspects of the criminal law that make this so: "the prosecution's discovery rights in criminal cases are limited, . . .; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence of guilt . . .; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence . . .; and it cannot secure appellate review where a defendant has been acquitted." (*Standefer v. United States, supra,* 447 U.S. at p. 22 [64 L.Ed.2d at p. 699].) Moreover, the court observed, "[t]he application of nonmutual estoppel in criminal cases is also complicated by the existence of rules of evidence and exclusion unique to our criminal law." (*Id.,* at p. 23 [64 L.Ed.2d at p. 700].) Thus, "[i]t is frequently true in criminal cases that evidence inadmissible against one defendant is admissible against another. The exclusionary rule, for example, may bar the government from introducing evidence against one defendant because that evidence was obtained in violation of his constitutional rights. . . . In such circumstances, where evidentiary rules prevent the Government from presenting all its proof in the first case, application of nonmutual estoppel would be plainly unwarranted." (*Id.,* at pp. 23-24 [64 L.Ed.2d at p. 700], fn. omitted.)

The reason the court refused to estop the initial prosecution of one person because of the acquittal of another on related charges is because of the unfairness that would result if the present defendant were permitted to *vicariously* reap the benefit of rules preventing the prosecution from fully presenting its proof against the person first prosecuted and from appealing the acquittal of that other person. No such unfairness would flow from the application of estoppel in this case. The prosecution's discovery rights against defendant were no different at his first trial than they would be at another. Nor was any rule of evidence applicable to the first trial that would not apply at a second. Nor does the absence of any remedial procedure at defendant's first trial provide any equitable justification for a second prosecution.

The reasons the majority thinks it would be "unfair" to estop a second prosecution in this case are not among those referred to in *Standefer*, nor so far as I am aware have they ever previously been relied upon by any court to justify the result. The majority would permit a second prosecution of defendant as perpetrator simply because they agree with the prosecution that he was the perpetrator and because the district attorney at the first trial assertedly was prevented from making a fair presentation of admissible evidence "because of an artificial curtailment of the People's theory and proof . . . ." (Maj. opn., *ante*, p. 1326.)

The "artificial curtailment" of the People's proof consisted of the exercise of the Fifth Amendment right to remain silent by Lawanna Walker, who is now willing to waive that right, and is expected to testify that defendant was the trigger man. This change of heart appears to be the result of a favorable plea bargain which, *though it could have been*, was apparently not offered Ms. Walker at the first trial. The majority seems therefore to be saying that a district attorney may withhold immunity, a favorable plea bargain or some other advantage sought by a witness who otherwise refuses to testify and hope that the jury will convict without that testimony; if the district attorney is proved wrong and the jury acquits, the prosecutor can then simply grant the witness the desired favor in return for the necessary testimony and retry the defendant for the same offense without violence to the doctrine of collateral estoppel. Such a scenario, which permits a district attorney to profit from his own miscalculation, should be inconceivable. Collateral estoppel must be applied independently of a prosecutor's strategy decisions. The district attorney in this case, who, as earlier pointed out, anticipated that the jury might find defendant guilty as an aider and abettor, could as easily before the first trial as afterwards have made Ms. Walker the offer that appears to have persuaded her to agree to testify. To use the witness's belated change of heart--or, more likely, the district attorney's belated exercise of his considerable power to induce such a change of heart--as a basis upon which to permit defendant to be retried for the same offense, and to do this in the name of fairness, gives a new and grotesque meaning to the word "unfair," which is certainly not the one the *Standefer* court had in mind.

Defendant's guilt or innocence of the offense for which the district attorney would retry him is irrelevant. As has been pointed out, "[w]hile the double jeopardy doctrine is not designed to protect criminals, it must be applied even though the result is frustration in whole or in part of punishment for crime in a particular case, and the fact that the result of upholding a plea of former jeopardy will be that [an] accused will go without sentence or punishment for an offense to which he had pleaded guilty does not alter his rights or change his position as to his right to plead former jeopardy." (22 C.J.S., Criminal Law, § 238, p. 617, citations omitted.)

The majority attempts to show that this case does not involve a double jeopardy issue by theorizing that defendant is subject to "continuing jeopardy," as that concept is explained in *Justices of Boston Municipal Court v. Lydon* (1984) 466 U.S. 294 [80 L.Ed.2d 311, 104 S.Ct. 1805]. My colleagues have again missed the point. The concept of continuing jeopardy, which simply permits the retrial of a defendant whose conviction was reversed on appeal, clearly does not permit the retrial of an offense, such as that involved in this case, where "there has been *some event*, such as an acquittal, which terminates the original jeopardy." (*Richardson v. United States* (1984) 468 U.S. 317, 325 [82 L.Ed.2d 242, 251, 104 S.Ct. 308], italics added; see discussion, *ante*, fn. 1, p. 1335.) Not one of the federal and state cases cited by the majority involved an attempt to relitigate an ultimate fact previously determined in favor of the defendant. The cases are all inapposite.

United States v. Ball (1896) 163 U.S. 662 [41 L.Ed. 300, 16 S.Ct. 1192], one of the early cases on the subject, illustrates very well why a person in the position of the defendant in the present case is not subject to continuing jeopardy. *Ball* involved murder charges against three defendants who were tried together. The jury acquitted one and convicted the other two. On the initial appeal the two convictions were reversed because the indictment, "by reason of failing to aver either the time or the place of the death of [the victim], was fatally defective, and would not support a sentence for murder . . . ." (*Id.*, at p. 664 [41 L.Ed. at p. 301].) The trial court thereupon dismissed the defective indictment and returned a new indictment against *all three* defendants. The two defendants who had been convicted then "filed a plea of former jeopardy, by reason of their trial and conviction upon the former indictment, and of the dismissal of that indictment." (*Id.*, at p. 665 [41 L.Ed. at p. 301].) The remaining defendant, Millard Fillmore Ball, filed a similar plea but relied primarily on the fact of his acquittal at the first trial. The state appellate court denied all three pleas on the ground that the original indictment was insufficient to serve as an indictment for murder and that the three defendants were therefore not initially placed in jeopardy. All three defendants were convicted at the second trial. The United States Supreme Court approved the reprosecution and affirmed the convictions as to the two defendants whose initial convictions earlier had been reversed, holding that "a defendant, who procures a judgment against him on an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense for which he had been convicted. [Citations.]" (*Id.*, at p. 672 [41 L.Ed. at p. 303].) In other words, the jeopardy of the two defendants who were initially convicted never terminated and they were subject to "continuing jeopardy."

It is in connection with the third defendant, however, that *Ball* is, for present purposes, most illuminating. The court reversed the conviction of this defendant, concluding that "a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing." (*United States v. Ball,* *supra,* at p. 669 [41 L.Ed. at p. 302].) In reaching this result, the court essentially adopted language in the dissenting opinion of Justice Livingston in *People v. Barrett* (N.Y. 1803) 1 Johns. 66, which until *Ball* had been the leading American case on application of the double jeopardy clause. Justice Livingston's views are particularly relevant to the case before us. "'This case,'" he stated, "'presents the novel and unheard of spectacle, of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect, as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury, on a suggestion of this kind, coming too from the officer who drew the indictment, seems not to comport with the universal and humane principle of criminal law, "that no man shall be brought into danger more than once for the same offence." It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end? . . . [T]he prosecutor, if he be dissatisfied and bent on conviction, has nothing to do but to tell the court that his own indictment was good for nothing; that it has no venue, or is deficient in other particulars, and that, therefore, he has a right to a second chance of convicting the prisoner, and so on, *toties quoties*.'" (*United States v. Ball, supra,* at pp. 667-668 [41 L.Ed. at p. 302], quoting *People v. Barrett, supra,* 1 Johns. at p. 74, dis. opn. of Livingston, J.)

The majority would permit the previously litigated question whether defendant directly committed the murder of Karen Taylor to be relitigated due in part to the failure of the prosecution at the first trial to obtain the more convincing testimony that it has apparently now secured. This reasoning is constitutionally proscribed. "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the prohibition against successive trials." (*Burks v. United States, supra,* 437 U.S. 1, 11 [57 L.Ed.2d at p. 9], fn. omitted; see also, *Greene v. Massey* (1978) 437 U.S. 19 [57 L.Ed.2d 15, 98 S.Ct. 2151]; *Hudson v. Louisiana* (1981) 450 U.S. 40 [67 L.Ed.2d 30, 101 S.Ct. 970].)

As indicated at the outset, I agree that the evidence suggests defendant may have been the actual killer and not merely an aider and abettor. However, under our system it is not the appellate courts but the jury that is the ultimate arbiter of the facts; its determination should not be disregarded simply because other minds would have reached a different conclusion or to provide the losing side an opportunity to present a stronger case.

Defendant has been subjected to a murder trial at which the jury's expressly determined he did not personally shoot Karen Taylor. As that issue has been clearly decided adversely to the prosecution it cannot be relitigated without offending the Constitutions of California and the United States. Accordingly, I would affirm the judgment.

On January 26, 1989, the concurring and dissenting opinion was modified to read as printed above. A petition for a rehearing was denied January 26, 1989. Kline P.J., was of the opinion that the petition should be granted. Respondent's petition for review by the Supreme

Court was denied April 20, 1989. Mosk J., and Broussard, J., were of the opinion that the petition should be granted.

APPENDIX D

**NOT TO BE PUBLISHED
IN OFFICIAL REPORTS**

FILED: May 16, 1985

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMES ANTHONY PETTAWAY Defendant and Appellant.	(A016897) (Sup. Ct. No. 73299)

This is an appeal from a judgment following convictions of murder and attempted murder.

We affirm in part and reverse in part.

Procedural History

On October 23, 1981, an information filed in Alameda County Superior Court charged appellant James Pettaway with first degree murder (Pen. Code, § 187) (count one) and attempted first degree murder (Pen. Code, § 664/187) (count II). The information also alleged personal use of a handgun (Pen. Code, §§ 1203.06, 12022.5) and personal infliction of great bodily injury during the commission of both offenses. (Pen. Code, §§ 12022.7, 1203.075.) Trial by jury resulted in verdicts of guilty on both counts and "true" findings as to both special allegations related to the attempted murder only.

Appellant filed a timely appeal from the judgment entered upon his convictions.

Statement of Facts

This case concerns the murder of Karen Taylor and the attempted murder of Michael Seals at Karen's home on Sunday morning, March 1, 1981. On that morning, appellant visited Karen. The two had met at the Astra Realty and Investment Company office in Oakland where both had been employed until Karen was terminated in 1980, and they had occasionally seen each other since. While appellant stayed behind at the house, Karen left to pick up Michael Seals at a bus stop. While Karen was gone, appellant's girlfriend, Lawana Walker, came by.

Karen returned with Michael. She joined appellant and Lawana at the dining room table. Michael stood near a heater between the dining room and the living room.

Appellant proceeded to offer cocaine to the two women. Karen declined; appellant and Lawana began to snort the cocaine while Michael watched.

Michael then heard appellant say to Lawana, "Give me the thing." Lawana took a handgun out of her purse and gave it to appellant. Appellant walked past Michael into the living room, gun in hand, and looked out the window. Appellant then turned toward Michael, who had his back to him, faced the women seated at the table, and shot Michael in the back of the neck. As he fell to the floor, Michael saw Karen get up and run into the kitchen. He then fainted. When Michael regained consciousness, he saw appellant and Lawana leave through the front door. He staggered outside; neighbors called for an ambulance.

The police arrived and entered Karen's home. They found her body lying in the bathtub. She had been shot twice while kneeling in the bathtub facing her assailant.

Appellant left the state. He was arrested in Texas several months later, after he ran a red light and following a long chase at high speed.

When arrested, appellant gave his name as "Willie Joe Wilson" and produced a birth certificate. A check of the license plates revealed they were registered to a different vehicle. Two California license plates traced to appellant were found in the trunk. At the police station, "Wilson" finally gave his true name as James Pettaway, the appellant. A search of his motel room turned up seven bullets which matched those found in Karen's house.

At trial, Leonard Stephens, the owner of Astra Realty, testified that appellant had worked for him and had known that Stephens kept a gun and ammunition in his office desk drawer. On Friday, February 27, 1981, the gun was in its usual place. Stephens came to the office on Sunday morning, March 1, and noticed the gun and some ammunition were missing. By 4 p.m. that day, the gun had been returned. Ballistic evidence showed that this had been the gun used to shoot Karen. The bullet lodged in Michael was never removed, and it could not be determined whether it had been fired from the same gun.

Stephens further testified that he spoke with appellant on the telephone on March 1 at about noon. Appellant at the time was at the real estate office. The following morning, Stephens spoke to appellant on the phone again, telling appellant that the police had seized his handgun and had made inquiries about appellant in connection with Karen's death. Appellant never again returned to work.

Appellant gave a different version of the events. According to him, he and Lawana were at the Astra Realty office on Saturday evening, February 28, 1981. They noticed that Stephens had left his gun in his desk drawer and took it for safekeeping, intending to give it to Stephens who lived across the street from appellant.

At 9:30 p.m., appellant and Lawana went to Karen's home, where a party was in progress. There they drank liquor and snorted cocaine, and left and came back to get appellant's pipe which he had left behind. Appellant, Lawana, Karen, and another man spent the rest of the night "[g]etting high."

At 10:00 a.m. the next morning, March 1, appellant and Lawana went to the Astra Realty office in order to get $300 and some cocaine appellant had left in his desk. They returned to Karen's house. Two men were there. Karen left to pick up Michael, asking appellant to keep an eye on the two men. Appellant agreed.

The two men, who had been using some cocaine, complained about its poor quality. Appellant gave them his own supply and the men disappeared with it into the back of the house.

Karen at that point returned with Michael. Karen asked appellant if she could use Stephens' gun to protect herself from the two men. Lawana gave the gun to appellant, who placed it on the dining room table and went to sit on the living room sofa. He closed his eyes, suddenly heard a gun shot, and saw Michael fall to the floor. Appellant heard a man say "[w]here is the other one at," and appellant fled out the front door.

Appellant stood on a nearby corner and saw Lawana walk out of the house with the two men. The men drove away in their car. Lawana took appellant back into the house to find a check she had earlier written to Karen as payment for cocaine. Appellant saw Michael on the floor, bleeding. He and Lawana left and eventually went to a motel in San Lorenzo.

Appellant later spoke with Stephens, who informed him that the police were looking for him. Lawana convinced him not to turn himself in. Lawana told him first that she had killed Karen, then that one of the men had done it because Karen had not paid him for some cocaine. Appellant believed there was a "contract" on his life because he had witnessed the murder. He and Lawana left the state.

Appellant explained that he fled from the police in Texas because, being a black man in a white section of town, he was in fear for his safety.

Finally, appellant testified that one of the two men at Karen's house was named Michael; he refused to identify the second man in order to protect his family from retaliation.

Instruction on Aiding and Abetting

Neither party requested, and the trial court initially did not give instructions on aiding and abetting. That theory had not been part of the prosecution's case-in-chief. However, during the third day of deliberations the jury requested the following: "Please explain the law concerning complicity, for example, in this case may the defendant be convicted of murder or attempted murder without having personally fired the bullets?"

The trial court complied with the request.[1]

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[1] The trial court evidently believed that there was sufficient circumstantial evidence to support an inference that appellant had aided and abetted Lawana Walker in the killing of Karen Taylor. It gave, in substance, CALJIC instructions Nos. 3.00 and 3.01, as follows:

"The persons concerned in the commission or attempted commission of a crime who are regarded by law as principals in the crime thus committed or attempted and equally guilty thereof include:

"1. Those who directly and actively commit or attempt to commit the act constituting the crime; or,

"2. Those who, with knowledge of the unlawful purpose of the one who does directly and actively commit or attempt to commit the crime, aid and abet in its commission or attempted commission; or,

"3. Those who, whether present or not at the commission or attempted commission of the crime, advise and encourage its commission or attempted commission." (CALJIC No. 3.00.)

"A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice, the commission of such crime.

"Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

"Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (CALJIC No. 3.01.)

Appellant argues that these instructions on the law of aiding and abetting were improper. We agree and reverse the murder conviction.[2]

Under People v. Beeman (1984) 35 Cal.3d 547, aiding and abetting instructions properly should state that "a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (Id., at p. 561.)

Here, the trial court instructed on the element of knowledge, but not that of intent. Under Beeman, this omission was error.[3] It removed from the jury's consideration the issue of whether appellant shared in the intent to commit murder.

Beeman did not prescribe the correct standard of review for such an error. Language contained in a footnote implies that the error may be of federal constitutional dimension, requiring reversal per se. The court stated: "While the error which flows from the giving of CALJIC No. 3.01 is not identical to a conclusive

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2. We discuss the instructions as they relate to the murder conviction only, because they were not prejudicial as to the attempted murder conviction. The jury did frame its question in terms of both the murder and the attempted murder charges. However, it found that the allegation that appellant had personally used a firearm in the attempted murder was true. Therefore, the jury did not convict appellant of the attempted murder on an aiding and abetting theory.

3. Beeman is applicable to this case. (People v. Minichilli (1984) 161 Cal.App.3d 660, 670.)

presumption or to placing the burden of persuasion on the defendant . . . , it is just as effective--if not more effective--in removing the issue of intent from the jury's consideration." (Id., at p. 561, fn. 4.)

In People v. Caldwell (1984) 36 Cal.3d 210, 224, however, the court, relying upon the standard set forth in People v. Sedeno (1974) 10 Cal.3d 703, concluded that the error requires reversal unless it is possible to determine that "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (Id., at p. 721.)

People v. Garcia (1984) 36 Cal.3d 539 suggests that reversal per se is warranted, unless 1) the erroneous instruction either pertained to a crime for which appellant was acquitted or had no bearing on the offense for which he was convicted; 2) appellant conceded intent; 3) the jury found that appellant had the requisite intent in connection with other, proper instructions; 4) intent was established as a matter of law.

We conclude that reversal is required here, under the reasoning of either Sedeno or Garcia. In making express findings that appellant did not personally use a firearm and did not inflict great bodily injury on Karen, the jury clearly convicted appellant of murder on an aiding and abetting theory. The aiding and abetting instructions given allowed the jury to find appellant guilty of first degree murder without considering the first degree murder instructions on intent.[4] Consequently, the jury did not necessarily resolve the issue of appellant's intent under other, proper instructions. (People v. Sedeno, supra, 10 Cal.3d 703.) By the same token, the third Garcia exception is inapplicable.

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[4] Under the CALJIC instructions given, an aider and abettor is regarded as a principal and is equally guilty. See footnote 1 above.

In addition, none of the other exceptions set forth in Garcia applies. The erroneous instruction pertained to an offense of which appellant was convicted. Appellant did not concede intent. Finally, intent was not established as a matter of law.[5]

Accordingly, in light of both Beeman and Garcia, we reverse appellant's conviction for murder.[6]

Instruction on Diminished Capacity

Appellant also contends that the trial court erred in instructing the jury sua sponte on the principle of diminished capacity, because the evidence did not support that legal theory and the theory is inconsistent with the argument of the defense that appellant did not commit the crime.[7] He claims that the instruction may have discredited appellant in the eyes of the jurors and, because its impact on the jury deliberations cannot be assessed, reversal is required.

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[5] The People contend that such intent was established because "no other scenario except one involving appellant's intentional participation . . . is imaginable." We disagree, however. As one example, it is entirely possible that appellant aided Lawana--assuming she was the perpetrator--by giving her the gun, knowing of her intent to kill Karen, without himself harboring the requisite intent.

[6] Given this result, we do not discuss apellant's remaining contentions on the aiding and abetting issue.

[7] Diminished capacity was still a valid defense at the time the crimes occurred.

The rule is that "the duty to give instructions, sua sponte, on particular defenses and their relevance to the charged offense arises only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (People v. Sedeno, supra, 10 Cal.3d 703, 716.)

In the present case, the evidence supports a diminished capacity defense. Appellant testified that throughout the previous night and until early morning on the date the crimes occurred, he drank liquor, used cocaine, and was "[g]etting high." Michael testified that appellant was snorting cocaine immediately before Michael was shot. (See, e.g., People v. Flannel (1979) 25 Cal.3d 668, 684-686; People v. Stevenson (1978) 79 Cal.App.3d 976, 985; People v. Vasquez (1972) 29 Cal.App.3d 81, 88-89.)

Appellant argues that it was error to instruct on diminished capacity because that defense was inconsistent with his theory of the case. We conclude, however, that if there was error, it was invited. "If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. However, because the trial court is charged with instructing the jury correctly, it must be clear from the record that defense counsel made an express objection to the relevant instructions. In addition, because important rights of the accused are at stake, it also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake." (People v. Wickersham (1982) 32 Cal.3d 307, 330.)

In the present case, the trial court, with great prescience, repeatedly asked counsel to state his position on a diminished capacity defense. It stated: "[¶] Now, if you do not want a dminished [sic] capacity instruction given, and you make that as a tactical choice, I will not give a diminished capacity instruction. Absent that, I will give one on my own initiative on the basis of the evidence I have before me." Counsel for appellant requested that the court give the instruction on its own initiative.

Later, the court again requested that counsel state his position: "[¶] I just want to know, do you have any objection to my giving it?" Counsel replied that he did not, but that he wasn't "asking for it, either." The judge again indicated that he would give it, absent an objection. Counsel said "Okay." Counsel subsequently clarified that he did not request the instruction, because it was his "understanding, that . . . it was mandatory that the Court give it. So, it was not needed; no point in my requesting it."

It is difficult to conceive of greater precautions that the trial court could have taken to prevent possible prejudice to appellant from the giving of the instruction. Given the record of the case, we conclude that even if the instruction was inconsistent with the defense's theory, error was invited and appellant may not now object.

Conclusion

We reverse appellant's conviction for murder. In all other respects, the judgment is affirmed.

Holmdahl, J.

WE CONCUR:

Racanelli, P.J.

Elkington, J.

NOT FOR PUBLICATION

FILED: March 24, 1992

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES PETTAWAY,	No. 90-15469
Plaintiff-Appellant,	D.C. No. CV-89-2601-SC
v.	
CHARLES PLUMMER, Sheriff of Alameda County,	ORDER
Defendant-Appellee.	

Before: BEEZER, NOONAN and FERNANDEZ, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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[illegible]

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the collateral estoppel doctrine, a component of the Double Jeopardy Clause, hitherto applied in criminal cases (as in civil cases) in retrials following a successful appeal as well as in successive trials, should now be limited in criminal cases only to successive trials?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

- A. The Offenses 2
- B. The Trial 3
- C. The First State Appeal 4
- D. The Hearing after Remand 5
- E. The Second State Appeal. 6
- F. The District Court Proceedings 6
- G. The Appeal to the Ninth Circuit 6

REASONS FOR DENYING THE WRIT 7

I. PETITIONER HAS WAIVED ANY CLAIM THAT ASHE V. SWENSON DOES NOT APPLY TO RETRIALS BY BELATEDLY RAISING IT FOR THE FIRST TIME IN HIS PETITION FOR REHEARING BEFORE THE CIRCUIT COURT WHEN THE APPLICATION OF ASHE HAS BEEN CENTRAL TO THIS LITIGATION SINCE ITS INCEPTION 7

II. NO CONFLICT BETWEEN FEDERAL CIRCUIT COURTS EXISTS ON THIS QUESTION ON THE QUESTION PRESENTED IN THE PETITION 9

III. ON THE FACTS OF THIS CASE THE CIRCUIT COURT CORRECTLY DECIDED THAT THE JURY'S UNANIMOUS DECISION THAT PETTAWAY DID NOT PERSONALLY USE A FIREARM OR INFLICT GREAT BODILY INJURY ON TAYLOR CONSTITUTIONALLY ESTOPS THE PROSECTION FROM RETRYING PETTAWAY AS THE GUNMAN BUT NOT AS AN AIDER AND ABETTOR. 12

A. Petitioner has Misstated the Circuit Court's Holding. 12

B. The Circuit Court's Rationale Correctly Applies This Court's Precedents. 14

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

Adickes v. Kress & Co.
398 U.S. 144 (1970) 8

Aiello v. City of Wilmington
470 F.Supp. 414 (D. Del. 1979) 10

Arizona v. Rumsey
467 U.S. 203 (1984) 15

Ashe v. Swenson
397 U.S. 436 (1970) 6, 7

Bivens v. Six Unknown Named Agents
403 U.S. 388 (1971) 8

Pettaway v. Plummer
943 F.2d 1041 (9th Cir. 1991) 1, 8, 9 10, 11 12, 15 16, 17 18, 19

Berkemer v. McCarty
468 U.S. 420 (1984) 8

Bullington v. Missouri
451 U.S. 430 (1981) 14, 15

Delap v. Dugger
890 F.2d 285 (11th Cir. 1989)
cert. denied, 496 U.S. 929 . . . . 9, 14

Dowling v. United States
493 U.S. 342 (1990) 18

In re Falstaff Brewing Corporation AntiTrust Litigation
441 F.Supp. 62 (E.D. Mo. 1977) 10

Grady v. Corbin
495 U.S. 508 (1990) 6, 8
18, 19

Lawn v. United States
355 U.S. 339 (1958) 8

Lockhart v. Nelson
488 U.S. 33 (1988) 14

North Carolina v. Pearce
395 U.S. 711 (1969) 14

Ohio v. Johnson
467 U.S. 493 (1984) 16, 17

Pugliese v. Perrin
731 F.2d 85 (1st Cir. 1984) 9

Rice v. Marshall
816 F.2d 1126 (6th Cir. 1987) 9

Segal v. American Telephone & Telegraph, Co., Inc.
606 F.2d 842 (9th Cir. 1979) 15

Span-Deck, Inc. v. Fabcon,Inc.
570 F.Supp. 81 (D. Minn. 1983) 10

Swentek v. USAIR, Inc.
830 F.2d 552 (4th Cir. 1987) 10

Tibbs v. Florida
457 U.S. 31 (1982) 19

United States v. Citron
853 F.2d 1055 (2nd Cir. 1988) 9

United States v. Crooks
804 F.2d 1441 (9th Cir. 1986) 9

United States v. De La Torre
639 F.2d 245 (5th Cir. 1981) 11

United States v. DeVincent
632 F.2d 155 (1st Cir. 1980) cert. denied, 450 U.S. 984 9

United States v. Dray
901 F.2d 1132, (1st Cir. 1990) cert. denied, 111 S.Ct. 245 9

United States v. Farmer
923 F.2d 1557 (11th Cir. 1991). 9, 18

United States v. Head
697 F.2d 1200, (4th Cir. 1982) cert. denied, 462 U.S. 1132 9

United States v. Larkin
605 F.2d 1360 (5th Cir. 1979) modified, 611 F.2d 585 cert. den.
sub. nom, Larkin v. United States, 446 U.S. 939 . . . . 9, 11

United States v. Lewis
798 F.2d 1250 (9th Cir. 1986) 8

United States v. Martin Linen Supply Co.
430 U.S. 564 (1977) 15

United States v. Mespoulede
597 F.2d 329 (2nd Cir. 1979) 9

United States v. Powell
632 F.2d 754 (9th Cir. 1980) 9

United States v. Price
750 F.2d 363, (5th Cir.) cert. denied, 473 U.S. 904 (1985) 11

Weinberger v. Rossi
456 U.S. 25 (1982) 8

Youakim v. Miller
425 U.S. 231 (1976) 8

Zdanok v. Glidden Co.
327 F.2d 944, (2nd Cir. 1964) cert. denied, 397 U.S. 934 10

STATE CASES

People v. Pettaway
206 Cal.App.3d 1312 (1988) 2, 11

People v. White
185 Cal.App.3d 822 (1985) 11

FEDERAL STATUTES

28 U.S.C. section 1245 2

28 U.S.C. section 2101(c) 2

STATE STATUTES

Penal Code section 31 5

Penal Code section 187 2

Penal Code section 1385 6

Penal Code section 12022.5 1

Penal Code section 12022.7 1

SUPREME COURT RULES

Supreme Court Rule 13.1 2

Supreme Court Rule 13.4 2

No. 91-1785

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHARLES PLUMMER, SHERIFF OF ALAMEDA COUNTY, Petitioner,

v.

JAMES PETTAWAY, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in Pettaway v. Plummer is reported at 943 F.2d 1041 (9th Cir. 1991) [Petitioner's Appendix A at 1-19, hereinafter App. A.]. The District Court's order denying respondent's petition for habeas corpus was unreported [App. B at 20-28]. The December 29, 1988, opinion of the

California Court of Appeal reversing the superior court's dismissal order is reported at 206 Cal.App.3d 1312, 254 Cal.Rptr. 436 (1988) [App. C at 29-94.] The May 16, 1985, opinion of the California Court of Appeal reversing respondent's conviction for violation of Penal Code section 187 [murder] was unreported [App. D at 95-106.]

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 23, 1991. Rehearing and rehearing en banc were denied on March 24, 1992 [App. E at 107]. The petition for certiorari was timely filed. 28 U.S.C. § 2101(c); Supreme Court Rules, 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1245.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

A. The Offenses

For the purposes of this brief, respondent incorporates by reference the Circuit Court's rendition of the prosecution facts. See App. A. at 4. As that court did not recite the defense facts, respondent incorporates the rendition of those facts in the California Court of Appeal's 1985 opinion. See App. D at 98-99. To summarize: On May 1, 1981, Pettaway, his girlfriend Lowana Walker, and another man, Michael Seals, were at the home of Karen Taylor. At some point, Lowana handed Pettaway a gun and Pettaway shot Seals in the back of the neck. Seals fainted. When he regained consciousness, he saw Pettaway and Lowana leave through the front door. Karen's dead body was later found in the bathroom. She had been shot twice.

Pettaway denied any involvement in either shooting. According to him, in addition to Walker, Seals, Taylor and himself, two other men were at Taylor's house. He heard a shot, saw Seals fall, and fled the scene. Later, he saw Lowana leave the house with the two men. After reentering the house with her and seeing Seals on the floor, bleeding, he and Lowana left.

B. The Trial

The prosecutor's principal theory of the case, and the one he argued to the jury, was that Pettaway had fired the fatal shots. The evidence and argument apparently did not persuade the jury to accept the prosecutor's theory of the case. The jury, which had not initially been instructed on aiding and abetting, made the following request during the third full day of deliberations. "Please explain the law concerning complicity, for example, in this case may the defendant be convicted of murder or attempted murder without having personally fired the bullets?"

At this point, the prosecutor changed gears. Apologizing for his earlier inadvertent failure to request aiding and abetting instructions, he urged the court to give them because "the jury could still convict the defendant of murder, if they believed Lawana Walker had in fact fired the fatal shots, because the only possible means of getting the gun would be from the defendant." App. C at 83-84. Over defense objection, the trial court instructed on aiding and abetting.

Shortly thereafter, the jury returned guilty verdicts on both counts. The jury also returned "not true" findings on the allegations that Pettaway had *personally* used a firearm and inflicted great bodily injury on Taylor in the commission of the murder. (Cal. Pen. Code §§ 12022.5, 12022.7.)[1] "True" findings were returned on those same allegations with respect to the attempted murder of Seals.

C. The First State Appeal

Pettaway appealed both convictions, arguing that the aiding and abetting instructions were prejudicially defective. Agreeing, the California Court of Appeal reversed Pettaway's murder conviction because "in making express findings that appellant did not personally use a firearm and did not inflict great bodily injury on Karen, the jury clearly convicted appellant of murder on an aiding and abetting theory. The aiding and abetting instructions given allowed the jury to find [Pettaway] guilty of first degree murder without considering the first degree murder instructions on intent. [fn omitted]. Consequently, the jury did not *necessarily* resolve the issue of appellant's intent under other, proper instructions." (emphasis in original). App. D. at 102-103.[2] The state appellate court affirmed Pettaway's attempted murder conviction, however, because the jury's affirmative findings on the enhancement allegations with respect to that count demonstrated that the attempted murder conviction was not premised on aiding and abetting.

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[1] Under California law, liability for firearm use and great bodily injury infliction requires personal culpability. In contrast, liability for murder can be based on either personal or derivative culpability.

[2] The State had argued that Pettaway's intent was established by the facts as a matter of law "because 'no other scenario *except* one involving appellant's intentional participation . . . is imaginable.'" The court specifically rejected that argument finding, to the contrary, that "it is entirely possible that [Pettaway] aided Lawana -- assuming she was the perpetrator -- by giving her the gun, knowing of her intent to kill Karen, without himself harboring the requisite intent." App. D. at 103, fn. 5 (emphasis in the original).

D. The Hearing after Remand

On remand after reversal of the murder conviction, Pettaway successfully argued that double jeopardy and collateral estoppel limited the prosecution at the second trial to the aiding and abetting theory, based on the jury's unanimous findings that he did not personally use the firearm to kill Karen Taylor and did not personally inflict great bodily injury on her during the commission of the homicide. After the court's ruling, the prosecutor represented that he intended to "call the exact same witnesses and proceed in the exact same fashion" as at the first trial, except that he now intended to call Walker to testify against respondent.[3] The trial court indicated that all of the evidence admitted at the first trial would be admissible on retrial. Walker's testimony, however, would be irrelevant "because it is being offered to prove not that he aided and abetted her or anybody else but that he actually did the killing." The prosecutor was unwilling to try the case with this limitation and announced himself unable to proceed. The court thereupon dismissed the case in the interests of justice under California Penal Code section 1385.

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[3] At the preliminary hearing held on October 9, 1981, the defense called Walker as a witness. She asserted her privilege against self-incrimination and refused to answer any questions, including the question whether she shot and killed Taylor. After the preliminary hearing she was also charged with murder and was held to answer to the same on December 8, 1981. At Pettaway's trial, which commenced on December 16, 1981, she was again subpoenaed by the defense and again asserted her privilege. The prosecutor chose not to give her immunity to testify.

At the time she asserted her privilege, Walker had given a statement to police in which she claimed that after Pettaway shot Seals he chased Taylor into a back room. She heard four shots, waited ten to fifteen minutes, and then went to investigate. She then saw Pettaway standing over Taylor's body with the gun. RT 14. At trial, however, Pettaway testified that Walker at one point confessed to him that she shot Taylor and then later recanted her confession.

In March 1983, Walker entered a plea of guilty to the reduced charge of accessory after the fact. Cal. Pen. Code § 31.

E. The Second State Appeal.

The State appealed, and on December 29, 1988 a divided panel of the California Court of Appeal reversed the dismissal in a published opinion. The majority held that double jeopardy was not implicated by negative jury findings on enhancement allegations and, in any event, the requirements of collateral estoppel were not met. Pettaway's petition for review in the California Supreme Court was denied on April 20, 1989.

F. The District Court Proceedings

Pettaway petitioned the District Court for the Northern District of California for a writ of habeas corpus. The petition was denied on January 2, 1990. The District Court held, in an unpublished opinion, that the jury's findings did not necessarily demonstrate that the jury had decided Pettaway was not the shooter.

G. The Appeal to the Ninth Circuit

Pettaway timely appealed to the Ninth Circuit Court of Appeals and, in a published opinion filed on August 23, 1991, that court reversed the district court's order and directed issuance of the writ. The Ninth Circuit found that Ashe v. Swenson, 397 U.S. 436 (1970), governed the case, and that Grady v. Corbin, 495 U.S. 508, (1990) provided an apt analogy. Concluding that all of the requirements of collateral estoppel were met, the Court found that the first jury's unanimous findings beyond a reasonable doubt established that Pettaway did not fire the fatal shots. Thus, double jeopardy principles would be offended if the State were permitted a second attempt to prove to a second jury that Pettaway had fired the shots. The Court found that neither Double Jeopardy nor collateral estoppel, however, prevented Pettaway's reprosecution for murder on the theory that he was an aider and abettor. Nevertheless, since the prosecutor expressly eschewed any intention of prosecuting Pettaway on that theory, the Court was constrained to hold that the prosecution could not proceed at all." App. A. at 19.

REASONS FOR DENYING THE WRIT

There are at least three good reasons why this Court should deny the writ. First, petitioner has waived the question he seeks to present to this Court; second, petitioner has not demonstrated a split in the Circuits on the question presented because none exists; and finally, the Circuit Court correctly decided that principles of collateral estoppel and Double Jeopardy preclude the prosecution from retrying Pettaway as the direct perpetrator, but do not preclude them from retrying him as an aider an abettor.

I.

PETITIONER HAS WAIVED ANY CLAIM THAT ASHE V. SWENSON DOES NOT APPLY TO RETRIALS BY BELATEDLY RAISING IT FOR THE FIRST TIME IN HIS PETITION FOR REHEARING BEFORE THE CIRCUIT COURT WHEN THE APPLICATION OF ASHE HAS BEEN CENTRAL TO THIS LITIGATION SINCE ITS INCEPTION

As petitioner partially acknowledges in a footnote (See Petition, at 11, fn.2), until his petition for rehearing and rehearing en banc in the Circuit Court, he never argued that collateral estoppel principles do not apply on retrial of the same case. Up until that time, throughout both the state court and federal court proceedings, petitioner has implicitly accepted that Ashe v. Swenson, 397 U.S. 436 (1970) applies with as much force in the retrial of a single case as in the successive trial of a different case. Far from disputing that proposition, petitioner has argued from that premise that collateral estoppel dignity should not be accorded the jury's special findings in this case for a variety of other, more case-specific reasons.

It is no excuse that petitioner did not think of this argument until the Circuit Court incorporated a discussion of Grady v. Corbin, 495 U.S. 508 (1990) in its opinion. Contrary to petitioner's suggestion, both sides had cited Grady in their briefs. More to the point, significant portions of Pettaway's opening brief and of petitioner's reply brief were devoted to arguments about why Ashe v. Swenson should or should not govern this case.

Under the Ninth Circuit's rules, arguments not timely presented are deemed waived, and this waiver doctrine applies to arguments raised for the first time in a petition for rehearing. United States v. Lewis, 798 F.2d 1250, 1250 (9th Cir. 1986) [order amending opn. and denying petn. for reh. & reh. en banc at 787 F.2d 1318 (9th Cir. 1986).] Since petitioner deprived the Circuit Court of any opportunity to address his contention in its opinion, and since not a single judge of the Circuit voted to rehear the case, this question has never been passed upon by the Circuit Court. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court. [citations omitted]. . . . 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.' [cit. omit.]." Youakim v. Miller 425 U.S. 231, 234 (1976). See also Berkemer v. McCarty, 468 U.S. 420, 443 (1984); Weinberger v. Rossi, 456 U.S. 25, 36, fn. 18 (1982); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397-398 (1971); Adickes v. Kress & Co., 398 U.S. 144, 147, n.2 (1970); Lawn v. United States, 355 U.S. 339, 362-363, n.16 (1958). For the reasons set forth below, this is not the exceptional case for which this Court should abandon the general rule.

II.

NO CONFLICT BETWEEN FEDERAL CIRCUIT COURTS EXISTS ON THIS QUESTION ON THE QUESTION PRESENTED IN THE PETITION

Petitioner alleges that a conflict between the circuits exists on the question whether Ashe v. Swenson applies to retrials, but demonstrates no such conflict. In fact, he concedes that "numerous federal circuit courts" have applied the collateral estoppel doctrine of Ashe to retrials, and cites some of them: United States v. Dray, 901 F.2d 1132 (1st Cir. 1990), cert. denied, 111 S.Ct. 245 (1990); United States v. DeVincent, 632 F.2d 155, (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981); United States v. Citron, 853 F.2d 1055 (2nd Cir. 1988); United States v. Head, 697 F.2d 1200 (4th Cir. 1982), cert. denied, 462 U.S. 1132; United States v. Crooks, 804 F.2d 1441 (9th Cir. 1986); United States v. Powell, 632 F.2d 754 (9th Cir. 1980). Petitioner's list is, in fact, incomplete. See also United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979) modified 611 F.2d 585 (1980) cert. den. sub. nom Larkin v. United States, 446 U.S. 939 (1980); Rice v. Marshall, 816 F.2d 1126 (6th Cir. 1987); Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), cert. denied, 496 U.S. 929 (1990); United States v. Mespoulede, 597 F.2d 329 (2nd Cir. 1979) and Pugliese v. Perrin, 731 F.2d 85 (1st Cir. 1984).

As petitioner further concedes, except for a passing query in a footnote in United States v. Farmer, 923 F.2d 1557, 1563, fn. 12 (11th Cir. 1991) (which nonetheless conducted a collateral estoppel analysis in the context of a retrial), none of the federal courts applying Ashe in any context have even suggested that the doctrine of collateral estoppel is limited to successive prosecutions.

There is a good reason for that. Ashe v. Swenson did not invent "collateral estoppel;" it explicitly borrowed the concept from civil litigation. Ashe, supra, 397 U.S. at 443. In the context of civil litigation it is well understood that "issue preclusion" (as the doctrines of direct and collateral estoppel have come to be known) applies in the retrial of the same case. "Issue preclusion may arise not only as between separate claims or causes of action but also within the confines of a single claim or cause of action. In the terminology that had become traditional by the advent of current efforts to refer to both types as issue preclusion, the first type is collateral estoppel and the second is direct estoppel. [fn. omit.] Direct estoppel questions ordinarily arise . . . [when] there is a decision that finally disposes of a part of a claim on the merits but does not preclude all further action on the remainder of the claim; issues common to both parts of the claim are precluded, even though new issues remain to be decided."[4] Examples abound of applications of the doctrine in retrials of the same civil case. See, for example, Zdanok v. Glidden Co., 327 F.2d 944, 955 (2nd Cir. 1964), cert. denied 397 U.S. 934 (1964); Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987); In re Falstaff Brewing Corporation AntiTrust Litigation, 441 F.Supp. 62, 66 (E.D. Mo. 1977) Span-Deck, Inc. v. Fabcon,Inc., 570 F.Supp. 81, 90 (D. Minn. 1983); Aiello v. City of Wilmington, 470 F.Supp. 414, 423 (D. Del. 1979), aff'd 623 F.2d 845 (3rd Cir. 1980).

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[4] Wright, Miller and Cooper, Federal Practice and Procedure, Vol. 18, § 4418, pp. 169-170.

Even United States v. Price, 750 F.2d 363 (5th Cir.), cert. denied 473 U.S. 904 (1985) does not provide the conflict in the circuits which petitioner alleges exists[5], since it is readily distinguishable from the Circuit's opinion below. In Price, supra, the Fifth Circuit found after reviewing the evidence and the split verdicts at the first trial of a multi-count trial that the acquittals on certain counts were simply inconsistent verdicts and therefore were not entitled to Double Jeopardy or collateral estoppel effect. Id., at 366. Here, by contrast, the Circuit Court explicitly found that this was not a case of inconsistent verdicts but rather one where "there is a rational explanation that takes into account the whole of the jury's verdict." App. A., at 13. Equally important, this is not a case where the federal court is alone in finding verdicts rational and consistent. The California Court of Appeal which reversed Pettaway's conviction in the first place did so because it found that the verdicts, as whole, demonstrated that "the jury clearly convicted [Pettaway] of murder on an aiding and abetting theory." App. D., at 102.[6]

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[5] Contrary to petitioner's assertion, Price did not establish a hard and fast rule that collateral estoppel principles never bar introduction of evidence on retrial. On the contrary, the Court preliminarily observed: "[e]ven though the doctrine affects the introduction of evidentiary facts necessarily determined in a prior lawsuit, United States v. De La Torre, 639 F.2d 245 (5th Cir. 1981), it does not prevent re-examination of an issue that is not necessarily determined in the former trial." Id., at 365. In De La Torre, supra and Larkin, supra, the Fifth Circuit had performed collateral estoppel analyses under the aegis of Ashe v. Swenson in retrials and had accepted as a matter of course that application of the doctrine in a particular case might limit pleading, evidence or argument. See De La Torre, supra, 639 F.2d at 248; Larkin, supra, 605 F.2d at 1371. Manifestly, there is no conflict between the Ninth and Fifth Circuits on the question whether Ashe v. Swenson can limit prosecution theories on retrial.

[6] It is true that the Circuit's opinion is at odds with the opinion of two justices of Division Two of the California Court of Appeal for the First Appellate District. See People v. Pettaway, supra [maj.opn.]. That opinion, in turn, refused to follow the earlier unanimous opinion of Division Five of the same court, on identical facts, in People v. White, 185 Cal.App.3d 822, 231 Cal.Rptr. 569 (1985). More importantly, the same "conflict" can be shown in every case where the federal court, on habeas corpus review, differs in outcome from the state court. Respondent submits that this Court's power to grant certiorari to settle important disputes between state and federal courts should not be engaged when even the state court has not

(continued...)

No conflict exists on the question presented between the Federal Courts or the State and Federal Courts. Certiorari should be denied for this reason alone.

III.

ON THE FACTS OF THIS CASE THE CIRCUIT COURT CORRECTLY DECIDED THAT THE JURY'S UNANIMOUS DECISION THAT PETTAWAY DID NOT PERSONALLY USE A FIREARM OR INFLICT GREAT BODILY INJURY ON TAYLOR CONSTITUTIONALLY ESTOPS THE PROSECTION FROM RETRYING PETTAWAY AS THE GUNMAN BUT NOT AS AN AIDER AND ABETTOR.

A. Petitioner has Misstated the Circuit Court's Holding.

Before turning to the merits, it is necessary to dispel certain inaccuracies in petitioner's characterizations of the Circuit's opinion. For example, petitioner asserts that the Circuit "has ordered a murder charge against respondent dismissed. . . ." (emphasis added) The Circuit has done no such thing. In fact, the Court's very narrowly drafted opinion makes it clear that if there is to be no retrial at all, that result is product of prosecutorial choice, not collateral estoppel principles. "[W]e hold only that it would violate double jeopardy principles if, on retrial of the second offense, the prosecution attempted to prove that Pettaway did personally use the gun. . . . Of course, the prosecution could still seek to prove Pettaway guilty of first degree murder under an aiding and abetting theory, but as we have pointed out, the prosecutor expressly eschews any intention to do so. Thus, because this prosecution must be based upon personal use

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[6] (...continued)
settled its internecine differences. This seems especially true when none of the opinions involved turned on the question presented in this petition -- whether Ashe v. Swenson applies only when distinct prosecutions are involved -- because petitioner never raised it.

of a firearm or nothing we are constrained to hold that it cannot proceed at all." App. A. at 19 (emphasis added).

The aiding and abetting theory which the prosecution professes to eschew is precisely the theory on which it won conviction at the first trial, albeit on defective jury instructions. Nothing in the Circuit's opinion prevents the prosecution even now from changing its mind, once this case is finally remanded to the trial court for further proceedings not inconsistent with the Circuit Court's opinion. In short, the opinion does not by any means bar retrial of respondent for Taylor's murder. It only precludes the state from retrying him on the personal gun use theory of which the jury acquitted him.

Petitioner also alleges that the Circuit has "created an exclusionary rule barring relevant evidence on retrial" (Pet. at 7, 9, 12) that will result in "evidence remaining [which] is insufficient to warrant conviction." Pet. at 14. Again, this is not true. The Circuit Court's opinion did not rule any evidence inadmissible. Indeed, it expressly declined to rule on the correctness of any evidentiary rulings. App. A. at 16, fn. 5. And, in fact, the state trial court's pretrial ruling did not exclude any evidence introduced by the prosecution at the first trial. The only evidence which the trial court provisionally barred was the testimony of Walker who, by prosecutorial choice, had not testified at the first trial. Whether the evidence which persuaded a first jury to convict under defective instructions will prove "insufficient to warrant conviction" under proper ones, remains to be seen.

B. The Circuit Court's Rationale Correctly Applies This Court's Precedents.

Petitioner argues that neither Double Jeopardy nor its incorporated doctrine of collateral estoppel protect a defendant from having to relitigate an ultimate fact found in his favor by a first jury if the prosecution seeks to reprove that fact to the new jury sworn to retry the defendant for the original offense. Such protection only applies where the prosecution seeks to try the defendant for a different offense. For this proposition petitioner cites the well-established rule that "the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to the conviction." Lockhart v. Nelson 488 U.S. 33, 38 (1988). See Pet. at 8-9. The rationale for that rule, of course, is that "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." North Carolina v. Pearce, 395 U.S. 711, 721 (1969). But as the Eleventh Circuit cogently observed in Delap.v Dugger, 890 F.2d 285, 312-313 (1989):

> Firmly established double jeopardy principles hold that a finding of insufficiency of the evidence renders the "clean slate" argument inapplicable. As the Court emphasized in Bullington v. Missouri, 451 U.S. 430 (1981)], "the 'clean slate' rationale recognized in Pearce is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case." 451 U.S. at 443 [parallel citation omit.].

Thus, it is clear that Double Jeopardy's bar against "successive prosecutions" has always applied to retrials of cases where the trier of fact or appellate court has determined that some critical evidence is insufficient.[7]

Petitioner acknowledges this point in a footnote, but asserts that "[n]either exception applies here." Pet. at 8, fn. 1. Despite his protestations, insufficiency of the evidence is exactly what is at issue in this case. The jury, by returning unanimous findings that the personal gun use and great bodily injury allegations vis a vis Karen Taylor were not true, unequivocally declared that the prosecution had not proved beyond a reasonable doubt that Pettaway had personally fired the fatal shots. These "separate verdicts" (Cal. Pen. Code, §1158a, subd.(b)) "actually represent[ed] a resolution, correct or not, of some of the factual elements of the offense charged." United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) quoted in Delap, supra, 890 F.2d at 312.

Petitioner is just as wrong in his assertion that collateral estoppel principles do no apply in retrials of the same case. As noted earlier, in Ashe this Court applied a concept it had borrowed from civil litigation. It would be nonsense to say that collateral estoppel principles do not apply in subsequent civil trials of the same case. "Issue preclusion, unlike bar, forecloses litigation only of those issues of fact or law that were actually litigated and necessarily decided by a valid and final judgement between the parties, whether on the same or a different claim." Segal v. American Telephone & Telegraph,

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[7] In Bullington v. Missouri, supra, for example, the state sought the death penalty anew after the trial court granted the defendant a retrial, even though the jury at the first trial had fixed the penalty at life imprisonment. Similarly, in Arizona v. Rumsey 467 U.S. 203 (1984), the state sought the death penalty after the state supreme court set aside the previously imposed life sentence and remanded the case for a new sentencing hearing. In both instances, double jeopardy principles were applied to retrials of the same case.

Co., Inc., 606 F.2d 842, 845 (9th Cir. 1979) (emphasis added.); see also cases ante. Nor has petitioner demonstrated any compelling reason for following a different rule in criminal cases.

Nothing in Ashe, supra or Ohio v. Johnson, 467 U.S. 493, 500, fn. 9 (1984) suggests that issue preclusion in the criminal law has a different meaning from issue preclusion in the civil law. In fact in Ashe, supra, the Court took great pains to show that applying the doctrine of collateral estoppel to a different second prosecution was analytically the same as applying it to the attempted retrial of the same case:

> After the first jury had acquitted the petitioner of robbing Knight, Missouri could certainly not have brought him to trial again upon that charge. Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing. The situation is constitutionally no different here, even though the second trial related to another victim in the same robbery." (Id., at 446)

Indeed, as the foregoing analogy makes clear, the application of issue preclusion in this case not an "extension" of Ashe at all. It is, rather, a more conservative application of Double Jeopardy principles than Ashe itself. If application of Double Jeopardy in its purest form prevents a new prosecution of the same charge on which there has been a previous acquittal, then Ashe is at the opposite end of the spectrum, for it prevents a new prosecution of an entirely different charge, because of a previous acquittal on a related charge. This case presents only an intermediate step between "pure" Double Jeopardy and Ashe: here the previous acquittal by special verdict on a discrete factual element of a charge prevents relitigation of that fact in a renewed prosecution of the same charge. This case does not take Double Jeopardy protection half as far as Ashe did.

The dictum in Ohio v. Johnson, supra on which petitioner relies (Pet. at 10) also does not support his claim that collateral estoppel is inapplicable on retrial after reversal on appeal. In Johnson, the defendant was charged in a single indictment with murder, involuntary manslaughter, aggravated robbery and grand theft. At his arraignment, over the State's objection, the trial court accepted his guilty pleas to involuntary manslaughter and grand theft, and then dismissed the murder and robbery charges on the ground that his prosecution for those counts would subject him to double jeopardy. It was in this factual context that the Supreme Court observed:

> [Defendant] also argues that prosecution on the remaining charges is barred by the principles of collateral estoppel enunciated by this Court in Ashe v. Swenson, 397 U.S. 436 [par. cit. omit.] (1970). . . . [T]he taking of a guilty plea is not the same as an adjudication on the merits after a full trial, such as took place in Ashe v. Swenson. Moreover, in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of a double jeopardy protection implicit in the application of collateral estoppel are inapplicable.

Ohio v. Johnson, supra 467 U.S. at 500, n. 9.

In speaking of seriatim prosecution in Johnson, supra, this Court was clearly differentiating the practice of filing successive indictments charging different offenses with the single indictment before the Court in Johnson. That factual distinction hardly supports the massive change in the doctrine of collateral estoppel that petitioner would have this Court adopt.

The Circuit's opinion properly placed primary reliance on this Court's opinion in Ashe which, since it factually involved successive prosecutions, did not discuss its application in situations involving retrials. It also properly relied on this Court's opinion in Dowling v. United States, 493 U.S. 342 (1990), which explicated Ashe, for the proposition that the Double Jeopardy Clause will not tolerate reprosecution when, in order to convict, a second jury will have to reach a conclusion directly contrary to that of the first jury. The Circuit Court's opinion is a sound application of this Court's controlling precedents.

The Circuit's supplementary discussion of this Court's then most recent opinion on Double Jeopardy jurisprudence in Grady v. Corbin, supra, does not change that fact. The Circuit Court's observations about Grady were not only proper but hardly unique. As both the Ninth Circuit and the Eleventh Circuit in United States v. Farmer, supra have recognized, Grady does have some illustrative value for collateral estoppel cases. For as the Farmer Court observed, "the Grady rationale applies with equal force to the instant case because collateral estoppel, like the type of 'same offense' test outlined in Grady, focuses on the issues actually litigated." Farmer, supra, 923 F.2d at 1564, fn. 16.

As the Circuit Court opinion recognized, Grady is also relevant to collateral estoppel cases because it illustrates that the policies served by the Double Jeopardy Clause in general and the collateral estoppel doctrine in particular are much broader than petitioner admits in his petition at page 11. The evil of successive prosecutions, "whether following acquittals or convictions," is not only that they subject the defendant "to embarrassment, expense and ordeal and compel[] him to live in a continuous state of anxiety and insecurity." Grady, supra, 495 U.S. at 518. "Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more the offenses charged." Id., at 518.)

Grady also demonstrates that this latter concern is implicated even when the first is not, fully. Grady held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, supra, 495 U.S. at 521. On the facts before it, that meant that the State could not seek to "prove the entirety of the conduct for which Corbin was convicted --driving while intoxicated and failing to keep right of the median -- to establish essential elements of the homicide and assault offenses." However, this Court frankly acknowledged that its holding did not bar prosecution for homicide and assault if the State could prove those charges without relying on the conduct to which Corbin had pleaded guilty, but instead relied on other conduct, such driving too fast for the weather conditions. Thus, even if the Double Jeopardy Clause did not completely protect Corbin from reprosecution, it still "prevent[ed] the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." Tibbs v. Florida 457 U.S. 31, 41 (1982) quoted in Grady, supra, 495 U.S. at 518.

The Circuit Court correctly saw a parallel between this case and Grady. Grady reiterated that the Double Jeopardy Clause will not permit the prosecutor to "refine[] his presentation in light of the turn of events at the first trial." Grady, supra, 495 U.S. at 518 quoting Ashe v. Swenson, supra, 397 U.S. at 447. Thus, while Grady is not about "collateral estoppel," it nevertheless provides a compelling analogue because it is animated by the same concerns, and much of the same analysis, as a collateral estoppel case. The Circuit Court's observations were not misplaced.

CONCLUSION

For the foregoing reasons, respondent Pettaway respectfully submits that the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be denied.

Dated: July 7, 1992

Respectfully submitted,

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Supreme Court, U.S.
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No. 91-1785

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES PLUMMER, SHERIFF OF ALAMEDA COUNTY,

Petitioner,

v.

JAMES PETTAWAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Table of Contents

Page

JURISDICTION 1

ARGUMENT 2

THE QUESTION WHETHER THE COLLATERAL ESTOPPEL COMPONENT OF THE DOUBLE JEOPARDY CLAUSE SHOULD BE EXPANDED TO RETRIALS SOUGHT BY THE DEFENDANT WAS PROPERLY RAISED BELOW 2

CONCLUSION 8

Table of Authorities

	Page
Cases	
Adickes v. *Kress & Co.* 398 U.S. 144 (1970)	2
Ashe v. *Swenson* 397 U.S. 436 (1970)	5
Blonder-Tongue v. *University Foundation* 402 U.S. 313 (1971)	3
Grady v. *Corbin* 495 U.S. 508 (1990)	4
Lawn v. *United States* 355 U.S. 339 (1958)	2
Procunier v. *Navarette* 434 U.S. 555 (1978)	2
United States v. *Lewis* 798 F.2d 1250 (9th Cir. 1986)	3
United States v. *Mendenhall* 446 U.S. 544 (1980)	2
Youakim v. *Miller* 425 U.S. 231 (1976)	2
Other Authorities	
Supreme Court Rules rule 15.6	1

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REPLY TO BRIEF IN OPPOSITION

JURISDICTION

Petitioner files this reply brief pursuant to rule 15.6 of the Supreme Court rules.

ARGUMENT

THE QUESTION WHETHER THE COLLATERAL ESTOPPEL COMPONENT OF THE DOUBLE JEOPARDY CLAUSE SHOULD BE EXPANDED TO RETRIALS SOUGHT BY THE DEFENDANT WAS PROPERLY RAISED BELOW

Ordinarily, this Court will not decide questions that were neither raised before nor considered by the Court of Appeals. *United States* v. *Mendenhall*, 446 U.S. 544, 551-552, n. 5 (1980); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970). The rule is not inflexible, however, and this Court may find that exceptional circumstances warrant review of the question presented. *United States* v. *Mendenhall*, 446 U.S. at 551-552, n. 5; *Youakim* v. *Miller*, 425 U.S. at 234; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16 (1958).

The Court has considered issues essential to the analysis of the Court of Appeals' decision, even if not precisely delineated in the question presented. *United States* v. *Mendenhall*, 446 U.S. at 551-552, n. 5; *Procunier*

v. *Navarette*, 434 U.S. 555, 559-560, n. 6 (1978). The Court also has considered issues not presented in the petition for writ of certiorari or addressed by the parties in the briefing on the merits, but which were raised in a brief by *amicus curiae* and were addressed by the parties at oral argument. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 319-320, & n. 6 (1971).

Respondent contends in his brief in opposition that petitioner did not timely present the issue raised here because it was first presented to the Court of Appeals in the petition for rehearing and rehearing en banc. Respondent contends that "[u]nder the Ninth Circuit's rules, arguments not timely presented are deemed waived, and this waiver doctrine applies to arguments raised for the first time in a petition for rehearing." Brief in Opposition at 8. Respondent does not cite a Ninth Circuit rule in support of this statement, and we have found none. Moreover, *United States* v. *Lewis*, 798 F.2d 1250 (9th Cir. 1986), cited by respondent, does not support the statement. In *Lewis*, the court stated only that, "[b]ecause the government failed to raise this question in its brief or at oral argument, we decline to address it." 798 F.2d at 1250. The court did no more than exercise its discretion not to hear a particular argument.

In the instant case, the question presented *was* raised in and resolved by the Court of Appeals. The question was squarely presented in the petition for rehearing, which challenged the Court of Appeals' application of the rule announced in *Grady* v. *Corbin*, 495 U.S. 508 (1990) to the retrial of criminal charges. See Fed. R. App. P. 40. The Court of Appeals ordered respondent to file a response to the petition for rehearing. Subsequently, the Court of Appeals denied the petition. Having ordered the response, it must be assumed that the court did not engage in an idle act, but instead considered the petition and response on the merits. Significantly, respondent did not argue in his response to the petition for rehearing that the issue raised therein had been waived.

Contrary to respondent's assertion, Brief in Opposition at 8, although both parties cited *Grady* v. *Corbin* as to basic double jeopardy principles in their initial briefs, neither party argued, or indeed even considered, that *Grady* established the rule for the application of double jeopardy principles on retrial. To have done so would have fundamentally changed the analysis, because *Grady* eliminates collateral estoppel as an independent doctrine. Once a defendant shows that "to establish an essential element of an offense charged in that prosecution, the government will prove *conduct* that constitutes an offense for which the defendant has already been prosecuted," *Grady* v. *Corbin*, 495 U.S. at 510 (emphasis added), the narrowly defined doctrine of collateral estoppel no longer has any function. *Grady* shifted the focus from the issues that a jury must necessarily have decided, *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970), to the conduct that the government seeks to prove.

The Court of Appeals' application of *Grady* in the circumstances of this case, and the magnitude of the consequent change in the law of double jeopardy, put into sharp focus the issue whether collateral estoppel has *any* application in the retrial of criminal charges. We addressed that precise issue in our petition for rehearing, and address it before this Court. As we stated in our petition for writ of certiorari, the issue is of nationwide importance, as it affects every criminal case, state or federal, in which retrial follows verdicts of both acquittal and guilt.

The significance of the issue merits consideration under the exceptional circumstances exception, should this Court find that the issue was not properly raised in and resolved by the Court of Appeals. In *United States* v. *Mendenhall*, 446 U.S. at 551-552, n. 5, this Court considered a contention not raised below because the assumption of the trial court and the Court of Appeals rested "on a serious misapprehension of federal constitutional law." Similarly, in this case, the Court of

Appeals' decision rested on a serious misapprehension of the principles of double jeopardy. In addition, the evidentiary record in the trial court is sufficient to permit consideration of the question, which involves only issues of law. See *id*. Accordingly, no bar exists to this Court's consideration of the question presented.

As to the other contentions in the brief in opposition, we feel no reply is necessary, having addressed them in our petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Dated: August 10, 1992

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